

APPENDIX

ORIGINAL

74-1047

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

UNITED OPTICAL WORKERS UNION LOCAL 408,
affiliated with the INTERNATIONAL UNION OF ELEC-
TRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

—against—

STERLING OPTICAL COMPANY, INC.,

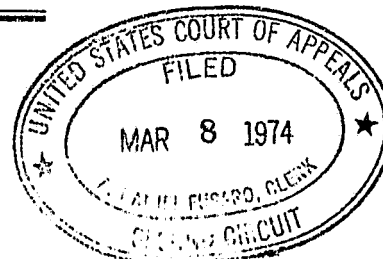
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

UNITED OPTICAL WORKERS UNION -vs- STERLING OPTICAL

DATE	FILINGS-PROCEEDINGS	AS CASE REPORTED IN EMOLUMENT RETURNS	
9-25-73	Complaint filed. Summons issued.	1	JS5
9-25-73	Affidavit of Efforts To Give Notice to Deft. filed.	2	
9-25-73	By MISHLER, CH. J. Order to Show Cause dtd 9-25-73 ret.		
9-26-73	2 2 PM for a hearing on a preliminary Injunction with proof of service filed.	3	
9-25-73	Summons returned & filed./executed	4	
9-26-73	Before MISHLER, CH. J. Case called on order to show cause for preliminary injunction re arbitration, etc. Motion argued		
	Decision reserved.		
9-28-73	By MISHLER, CH. J. - Order dtd 9-28-73 denying plttf's motion for T.R.O. and setting 10-5-73 at 2 P.M. for hearing on preliminary injunction filed.	5	
10-1-73	Letter from Mishler J. to Sipser, Weinstock, Harper & Dorn, filed.	6	
10-4-73	ANSWER of Deft. with counterclaim filed.	7	
10-5-73	Stipulation of facts filed.	8	
10-5-73	Deft's memorandum of law in opposition to plttf's motion for a preliminary injunction, etc. filed.	9	
10-9-73	Reply affidavit of Sebastian J. Rebaldo to employer's order to show cause for partial summary judgment filed.	10	
10-9-73	Plttf's memorandum of law filed.	11	
10-9-73	By MISHLER, CH. J. - Order to show cause dtd 10-3-73 for partial summary judgment in favor of deft ret 10-9-73 filed.	12	
10/9/73	Before MISHLER, CH. J. - Case called- Motion for a preliminary injunction argued and cont'd to Oct. 11, 1973		
10-11-73	Plttf's supplemental memorandum of law filed.	13	
10-11-73	Deft's supplemental memorandum of law filed.	14	
10-11-73	Affidavit of personal service for order to show cause and answer filed.	15	
10-11-73	Before : Mishler, CH J. Case called for a preliminary injunction Motion continued & argued. Motion for an injunction is denied. Motion for summary judgment denied, settle order on notice.		
10-12-73	Steno's transcript dtd 10-11-73 filed.	16	
10-17-73	Plttf's reply to counterclaim filed.	17	
10-18-73	Before MISHLER, CH. J. - Case called. Conference held in chambers Conference concluded.		
10-24-73	Steno's transcript dtd 9-25-73 filed.	18	

11C

0-1404 UNITED OPTICAL WORKERS UNION LOCAL 408
vs. DOUGLASS & CO. OPTICAL COMPANY, INC.

FILED - PROCEEDINGS		CLERK'S FEES	
		PLAINTIFF	DEFENDANT
-73	Stipulation of facts, filed.		19
-73	Pltff's memorandum of law in support of motion for summary judgment filed.		20
-73	By MISHLER, CH. J. - Order to show cause dtd 11-14-73 for an order granting pltff summary judgment dismissing deft's counterclaim, ret 11-16-73 at 11:30 A.M., without proof of service filed.		21
73	Before MISHLER, CH.J. - Case called- Motion submitted- (Order to show cause to grant summary judgment)-Decision reserved.		
0-73	By MISHLER, CH. J. - Memorandum of decision dtd 12-6-73 denying injunction, etc. filed.		22
0-73	By MISHLER, CH. J. - FINAL JUDGMENT dtd 12-6-73 declaring paragraph XXVIII null and void, and that both sides submit to arbitration filed. (p/c mailed to attys):		23
0-73	By MISHLER, CH. J. - Order to show cause dtd 12-18-73 for an order to stay enforcement of judgment ret 12-21-73 at 3PM without proof of service filed.		24
21-73	Before MISHLER, CH. J. - Case called. Motion for an order to stay enforcement of judgment entered on 12-10-73. Motion adjd to 1-7-74 at 9:30 am on consent.		
74	Affidavit of Personal Service filed		25
-74	Affidavit of Robert M. Ziskin in opposition to application for stay of judgment filed.		26
-74	Before MISHLER, CH. J. - Case called. Motion for an order to show cause for an order to stay enforcement of judgment entered on 12-10-73 argued. Stay granted. Submit order. Adjd to 1-18-74 at 11:30 am for review.		
-74	Notice of appeal filed. Duplicate mailed to C of A. in		27
74	Letter dated 12/21/74 filed from R. Ziskin to J. Mishler		28
74	By MISHLER, CH. J. - Order dated 1/11/74 staying judgment pending appeal/ filed. P/C mailed to the attys. (Order with Notice of Settlement)		29
4-74	Bond for cost on appeal filed.		30

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
: UNITED OPTICAL WORKERS UNION,
: LOCAL 408, affiliated with the INTER-
: NATIONAL UNION OF ELECTRICAL, RADIO
: & MACHINE WORKERS, AFL-CIO,
:

: Plaintiff,
:

: -against-
:

: STERLING OPTICAL COMPANY, INC.,
:

: Defendant.
:
:-----X

COMPLAINT

Plaintiff, by its attorneys, Sipser, Weinstock,
Harper & Dorn, complaining of the defendant, respectfully alleges:

FIRST: Defendant Sterling Optical Company,
Inc. (hereinafter "Employer") upon information and belief, is a
corporation, organized, existing and doing business in the
State of New York, with its principal office at 3000 Marcus
Avenue, Lake Success, New York. It maintains optical shops
located in Hempstead, Levittown, Huntington, Bay Shore, Jamaica,
Staten Island, Brooklyn and New York City, New York and optical
laboratories located at 160 Jay Street, Brooklyn, New York and
138 Fulton Street, New York, New York, where it is and has been
at all times material herein, engaged in providing complete
optical services, including the fabrication of lenses. In the
course and conduct of its business operations, the Employer
has purchased and received lenses, eyeglass frames and re-
lated materials from points outside the State of New York,
which it sells and distributes both within and without the
State of New York. The Employer is, and has been at all
times material herein, engaged in an industry affecting inter-
state commerce.

SECOND: Plaintiff, United Optical Workers Union, Local 408, affiliated with the International Union of Electrical, Radio & Machine Workers, AFL-CIO (hereinafter "Union"), is a labor organization with offices located at 200 Park Avenue South, New York, New York, and is engaged in representing employees for collective bargaining purposes, in an industry affecting interstate commerce.

THIRD: Jurisdiction is conferred on this Court by Title 29 United States Code §185.

FOURTH: The Union was certified by the New York State Labor Relations Board, in or about 1953, as the sole and exclusive collective bargaining agent of the employees of the Employer. It has since then represented and continues to represent said employees.

FIFTH: The Employer and the Union, have since the aforesaid certification entered into a series of collective bargaining agreements; the most recent of which was entered into on April 30, 1973, and continues in effect until April 30, 1976. A copy of said agreement is annexed hereto as "Exhibit A".

SIXTH: The collective bargaining agreement between the parties, in Article VIII, provides for a grievance procedure and for arbitration of differences which the parties are unable to resolve. That Article in relevant part provides as follows:

"Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties to this Agreement, even

though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.

"(a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided."

SEVENTH: On or about September 17, 1973, the Employer without prior notice to or consultation with the Union, advised that it had determined to subcontract out laboratory work, which work has at all times material herein been performed by bargaining unit employees employed at 160 Jay Street, Brooklyn, New York, and that the Employer would on or about September 28, 1973 discontinue the laboratory operations of its Brooklyn plant and terminate the employment of its 36 bargaining unit laboratory employees.

EIGHTH: The said action of the Employer was in violation of numerous provisions of the collective bargaining agreement between the parties, including, among others, Articles I, II, IV, VII, IX, XVI, XXI, XXII, XXIII, XXIV, XXVII, XXIX, and XXX.

NINTH: The Union met with the Employer in an effort to resolve their differences, but were unable to adjust such differences.

TENTH: Accordingly, and on or about September 21 and 24, 1973, the Union served the Employer with a demand to arbitrate the items of difference between the parties. A copy of the aforesaid Demands are annexed hereto as "Exhibit B".

ELEVENTH: All of the items sought to be arbitrated are encompassed within the arbitration clause of the parties collective bargaining agreement.

TWELFTH: The Employer has refused the demand of the Union for arbitration.

THIRTEENTH: The refusal of the Employer to arbitrate is in violation of the collective bargaining agreement.

FOURTEENTH: The Employer threatens to pursue its announced course of action, to subcontract out the laboratory work performed by bargaining unit employees employed at the Brooklyn plant; terminate its laboratory operations at the Brooklyn plant; layoff its laboratory employees at the Brooklyn plant, nullify various clauses of its collective bargaining agreement granting rights and benefits to its laboratory employees and the Union, and terminate its agreement prior to the stated termination date. The Employer threatens to complete such action on or before September 28, 1973, and prior to the time within which the arbitration proceeding could under normal circumstances be scheduled and consummated.

FIFTEENTH: Unless the Employer is enjoined and restrained from taking action which it threatens prior to the determination of the issues sought to be arbitrated, the Plaintiff and the employees whom it represents will be irreparably injured, the subject of the arbitration will be effectively disposed of, the laboratory employees will be without employment, and the arbitration will be rendered an action in futility.

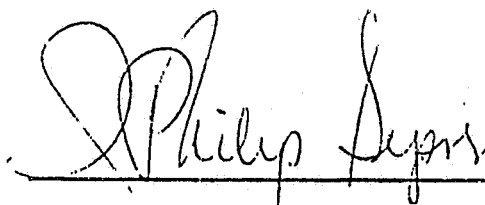
WHEREFORE, plaintiff respectfully prays for judgment
as follows:

1. Declaring that the defendant has violated the contract between the plaintiff and the defendant.

2. Directing and compelling the defendant to arbitrate the issues which have arisen between the parties as set forth in the plaintiff's demand for arbitration, in accordance with the contract provisions.

3. Restraining and enjoining the defendant from subcontracting out laboratory work performed by bargaining unit employees at its Brooklyn plant, closing down the laboratory operations at the Brooklyn plant, or any portion thereof, laying-off and/or terminating laboratory employees at its Brooklyn plant, or discontinuing its normal business operations thereat prior to the completion of the arbitration proceeding and the rendering of the arbitrator's award determining the issues.

4. Granting to the plaintiff such other and further relief as may be just and proper in the premises, together with the costs and disbursements of this action.



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EXHIBIT A ANNEXED TO COMPLAINT
COLLECTIVE BARGAINING AGREEMENT

AGREEMENT

Between



UNITED OPTICAL WORKERS UNION
LOCAL 408, IUE, AFL-CIO

and

Sterling Optical Co. Inc.

APRIL 30, 1973

to

APRIL 30, 1976

This Agreement executed and effective Apr. 30, 1973 between 9a
STERLING OPTICAL COMPANY, INC. of 3000 Marcus Avenue, Lake Success,
New York, hereinafter referred to as the "Employer" and UNITED
OPTICAL WORKERS' UNION, LOCAL # 408, IUE, AFL-CIO, of 200 Park Ave.,
South, New York, New York, hereinafter referred to as the "Union".

The Parties agree as follows:

W I T N E S S E T H

WHEREAS, the parties hereto desire to establish the standards and conditions of labor under which the employees shall work for the Employer during the term of this agreement; and

WHEREAS, it is the intent and purpose of the parties that this agreement shall promote and improve the industrial and economic relations between them, and to set forth herein their agreement covering rates of pay, hours of work and conditions of employment;

NOW THEREFORE, in consideration of the mutual covenants and obligations herein contained, the parties agree as follows:

ARTICLE I.

The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees in the Sterling Optical Company, Inc., in Lake Success, New York, within the radius of fifty (50) miles from Columbus Circle in the City of New York, including but not limited to present shops located in Manhattan, Yonkers and Hempstead, with respect to rates of pay, wages, hours of employment and other conditions of employment, excluding Executives, Supervisors, Bookkeepers, Executive Secretaries, Merchandise Controllers, Porters and Hearing Aid Personnel. The following are the Departments:

- (a) Optometrists;
- (b) Receptionists, Office Staff, Clerical Personnel, Mail Clerks;
- (c) Bench;
- (d) Quality Control;
- (e) Surface;
- (f) RX;
- (g) Dispensers (Sales and Deliveries);
- (h) Errand Boys;
- (i) Machinists and Machine Maintenance and Rebuilding (machine maintenance and repair now being done by other personnel to be continued)
- (j) Stock Clerks

ARTICLE II

The Employer agrees that it will not interfere with, restrain or coerce its employees in their right to join or assist the Union; that it will not discriminate in regard to hire or tenure of employment or any terms or conditions thereof to discourage membership in the Union; that it will not discharge or otherwise discriminate against any employee because of his union activity providing such activity does not interfere with the proper discharge of his duties as such employee.

ARTICLE III

(a) All employees covered by this Agreement shall as a condition of continued employment, become members of the Union thirty (30) consecutive working days from the effective date of this provision and shall thereafter maintain their membership in the Union

in good standing. All employees hired hereafter shall, as a condition of continued employment, become members of the Union thirty (30) consecutive working days after the commencement of their employment or the effective date of this provision, whichever is later, and shall thereafter maintain their membership in the Union in good standing. Upon completion of the trial period, the Employer shall notify the Union that such employee or employees have completed their trial period and are permanent employees.

10a

(b) Any employee who is expelled or suspended from the Union because of non-payment of initiation fees or dues (including such other obligations to the Union, failure to pay which would make an employee subject to discharge under applicable law) and an employee who is expelled or suspended from the Union for any reason for which he may lawfully be discharged, shall be subject to dismissal five (5) days after notification in writing to the Employer by the Union, provided, however, that the expulsion or suspension is for non-payment of initiation fees or dues, and payment of such arrearage is made within the aforesaid five (5) day period, the Employer shall not be required to discharge such employee.

(c) The Employer agrees that in hiring help, it shall give preference to employees registering with the employment office operated by the Union; however, the Employer reserves the right to hire employees from any source whatever.

The facilities of the employment office operated by the Union shall be available to both members and non-members of the Union, and the Union warrants that in the operation of said employment agency and in referrals to the Employer it will not discriminate against any individual applicant for employment because of non-membership in the Union, or otherwise restrain or coerce such applicant because of non-membership in the Union. Any employee hired from the open market shall promptly following his employment, be required to register and secure a registration slip as evidence of such registration at the Union employment office within five (5) working days of the date of employment for the purpose of assisting the Union in administering this Agreement and in observing and maintaining standards desired by the Employer in filling vacancies. The Employer shall promptly within five (5) working days notify the Union whenever such employees are hired.

ARTICLE IV

(a) All employees retained in the employ of the Employer for thirty (30) consecutive working days, shall be considered qualified and regular employees, except apprentice dispensers whose trial period shall be for sixty (60) consecutive working days; their seniority rights shall be recognized in their respective Departments from the first day employed, at the last hiring date. New employees hired, during the thirty (30) or sixty (60) day trial period, are not entitled to any benefits under this Agreement. However, such employees retained by the employer, after the thirty (30) or sixty (60) day trial period, shall be paid, retroactive to the date hired, any benefits they would be entitled to had they been regular employees, except as hereinafter provided.

(b) For the purpose of lay-offs, in the event same shall become necessary, seniority shall be applied by Departments. No new employee shall be hired by the Company while any lay-offs are in effect, it being the intention of the Parties that the Company shall re-hire all laid-off employees in the inverse order of seniority before any new employees are hired.

(c) It shall be the policy of the Employer to make all promotions and fill such vacancies from the ranks of the employees, providing they have the ability to perform the work. It is understood that management has the sole right to decide the ability of any employee when making such promotions.

(d) Any employee who is transferred from one Department to another, such employee shall still retain his or her seniority from the Department from which such employees have been transferred, provided however, that such transfer or transfers were made for the convenience of management.

ARTICLE V

Upon written authorization, the Employer agrees that the dues and initiation fees of the members of the Union, according to the schedule which the Union agrees to furnish the Employer, including such assessments which the Union shall levy and give notice thereof, in writing, to the Employer, shall be deducted from the wages of said members of the Union on the first payroll date of each month. The Employer further agrees to remit such dues, initiation fees and assessments so checked off, to the United Optical Workers' Union, Local 408, IUE, AFL-CIO, 200 Park Ave. S. New York, N.Y. 10003, within five (5) days thereafter.

No authorization is required by the Employer to make contributions to the Insurance and Pension Funds, and the Employer shall upon completion of any employee's trial period make the contribution to the Insurance and Pension Funds as called for on behalf of such employees.

ARTICLE VI

(a) The regular working hours for all employees shall be forty (40) hours per week, Monday through Saturday of each week inclusive, including one day off, except for personnel in the kitchen, whose forty (40) hours shall be spread over Monday through Saturday. Employees must be available and report for the days and hours of work as scheduled and required by the Employer.

(b) All time worked in excess of forty (40) hours per week shall be paid for at the rate of time and one-half, except as to Shopmen Benchmen and RX Clerks employed at 138 Fulton Street and at 160 Jay Street, Brooklyn, N.Y. only--hours worked by them in excess of eight (8) hours per day shall be paid for at the rate of time and one-half for excess hours. However, Shopmen Benchmen, and RX employees employed at 138 Fulton Street, New York, N.Y. and at 160 Jay Street, Brooklyn, N.Y. shall receive overtime for all hours in excess of forty (40) hours per week. Overtime for such employees, however, shall not be cumulative.

(c) Double time shall be paid for work performed on Sundays. Where work is performed on any holiday designated herein as such, time and one-half (1½) in addition to payment for such holidays shall be paid. No employee shall be required to work overtime when called upon to do so, if such employee has a reasonable excuse for not working overtime. No employee should be compelled to work on Sunday or on a designated full holiday, except Washington's Birthday, Lincoln's Birthday, Election Day and Columbus Day.

(d) It is agreed by and between the Parties that when any overtime shall be performed, it shall be granted on a seniority basis in each Department and such personnel must be able and competent to perform the work required during overtime periods; except that the Shop Steward and Committeemen shall have preference for overtime work, provided they have the ability to perform such work.

(e) Sick Leave in any one work week shall be computed as part of any work week. Employees who have taken sick leave in any one work week shall be paid overtime in accordance with Paragraph (b) above.

schedules, they shall be called to the Shop Steward's and those involved attention.

12a

(g) It is agreed that employees shall receive one (1) ten (10) minute coffee break daily.

ARTICLE VII

(a) The following shall be holidays, for which every employee shall receive a regular day's pay without performing any work:

New Years Day
Washington's Birthday
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day
1st Day of Rosh Hashanah
Yom Kippur
Lincoln's Birthday
Election Day
Columbus Day

The following shall be half holidays for which every employee shall receive a half day's pay without performing any work:

Armistice Day

(b) Employees who are full time on a designated half-holiday shall not be paid for the half holiday but shall receive time and one-half for all hours worked. If any of the named holidays fall on an employee's regular scheduled day off such employee shall nevertheless receive pay for the holiday. The Employer may require any employee to work on Washington's Birthday, Lincoln's Birthday, Election Day and Columbus Day. All full time employees called in to work on any half holiday shall work a full eight (8) hour day.

(c) In the case only when an employee works on a holiday for which he received holiday pay and time and one-half for the hours worked on that day, if he works the sixth day during that holiday week, he shall be paid time and one-half for the hours worked on that sixth day. If the employee does not work on a holiday for which he receives pay, that holiday shall be counted as a day worked for computing overtime in that week.

ARTICLE VIII

Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both Parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.

(a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided.

ARTICLE IX

The Employer agrees that it will not discharge any employee except for just cause. In the case of drunkenness or theft, discharge may be immediate and without notice to the Union. Any employee who is repeatedly late or absent without valid reason and who has been warned concerning such lateness or absence and notice thereof given to the Union, and the employee afforded an opportunity to mend his ways and who fails to discontinue said lateness or absence shall be discharged. This clause shall not be construed as a waiver of the arbitration provisions of this Agreement. The Union shall reserve the right to arbitrate any actions taken by the Employer.

ARTICLE X

There shall be no reduction of the individual rates of any employee.

Article XI

The Employer will furnish all tools necessary or incidental to the work without charge to the employees. No employee shall be charged for any damage to material unless willfully done.

ARTICLE XII

Wages shall be paid by Thursday noon in the week following the week worked, in cash or check. In the event the named payday falls on a holiday, payment of wages is to be made the following day. All employees who are laid off, quit, or are discharged shall receive all wages and other benefits which they have earned at the time of the layoff, quitting or discharge. It is agreed, however, that employees who have been employed for three (3) or more years, should they quit, they will receive on a pro-rated basis, vacation pay for months worked during current vacation year.

ARTICLE XIII

A representative of the Union shall be permitted to enter the premises of the Employer, at the office of the Employer at any time during working hours, to carry out the terms of this Agreement and to ascertain if the terms hereof are being complied with.

ARTICLE XIV

The Employer will keep a set of payroll records which will indicate the number of hours worked by each individual employee together with the rates paid to such employees. These records may be examined by the Union through a representative or accountant, or both, during business hours.

ARTICLE XV

During the term of this Agreement there shall be no strike, work stoppage, slowdown or lockout. Any employee who participates in any strike, work stoppage or slowdown shall be subject to discharge by the Employer, which discharge shall be subject to the arbitration procedures set forth herein.

ARTICLE XVI

A layoff shall not be effective against employees employed for over three calendar months unless one (1) working day's advance notice thereof is given to the employee or employees affected.

Employees employed over three (3) years shall receive three (3) working days advance notice of layoff.

ARTICLE XVII

The Employer agrees to establish a bulletin board with a swinging glass door, which shall be locked with a key by the Shop Steward, who shall be the only person holding the key in his

position. The Employer shall retain a key. The Union shall be furnished by the Union.

14a

ARTICLE XVIII

The Union shall designate a Shop Steward and committee members who shall assist the Union in carrying out the intents and purposes of this Agreement, provided such activities do not unduly interfere with the proper discharge of his duties as an employee. The Shop Steward shall be entitled to top seniority in the plant.

ARTICLE XIX

The Shop Steward shall have the right to use a telephone for the purpose of communicating with the Union.

ARTICLE XX

The Employer agrees to supply soap and towels for its employees without cost to the employees. The Employer will maintain sanitary conditions throughout the premises.

ARTICLE XXI

(a) The Employer hereby agrees during the term of this contract, to contribute monthly on or before the 5th day of each and every month, commencing with April 30, 1973 to the United Optical Workers' Insurance Fund, a sum equal to five percent (5%) of the previous month's base payroll to be used by said Insurance Fund for the sole benefit of the employees of the Employer to provide Death Benefits, Accidental Death and Dismemberment Benefits, Weekly Accident and Sickness Benefits, Medical Expense Benefits, Family Medical Expenses in hospital, Family Laboratory Examinations and X-Ray Benefits, Family Surgical Expense Benefits, Family Anaesthesia Allowance Benefits, Major Medical Benefits and Family Hospitalization Benefits in accordance with the schedule of such respective forms of benefits attached hereto. It is further understood and agreed that the Employer shall be under no obligation to see to the application of monies paid to the Fund pursuant to this paragraph for the purpose and uses above mentioned, but the Fund, nevertheless, agrees to render reports at regular intervals to the Employer respecting application of the monies received and benefits paid.

(b) The Employer agrees to make available to the United Optical Workers' Insurance Fund any and all records of employees hired, classifications of employees, names, Social Security numbers and account of wages paid, that the Fund may require in connection with the sound and efficient operation of the Fund, and the agreement contained in this paragraph shall be considered as of the essence of this contract.

ARTICLE XXII

Employees shall be entitled to five (5) working days sick leave with pay during each year of this Agreement. Any abuse, or the filing of a false claim by an employee for sick leave with pay shall subject that employee to disciplinary action under Article IX of this Agreement. An employee eligible to receive sick leave pay shall, at the end of each contract year, be then paid for any days of unused sick leave in that year not exceeding said five (5) days sick leave. After a new employee becomes eligible for sick leave, he shall be entitled to pro-rated sick leave from the date of his

eligibility to the end of that contract year in which he became eligible.

15a

Upon signing of this Agreement, new employees hired shall not become eligible for sick-leave until they have been employed for three (3) months. This shall not affect employees who are employed at the time of the signing of the Agreement.

Any employee claiming pay for sick-leave shall supply proof of illness, if requested to do so by the Employer.

(a) An employee who requests, and is granted a leave of absence for bona fide illness, which absence shall not exceed a period of ninety (90) days, will be entitled to their positions, provided that said employee is physically able to return and perform his regular duties, and provided that such employee informs the Company in writing at least ten (10) days in advance of the day he will return to work.

(b) An employee who is scheduled to work may be excused from work because of a death in his immediate family. If excused, he shall be paid an allowance for the hours he is scheduled to work Monday through Saturday, not to exceed eight times his base rate of pay for each day excused up to but not to exceed three days.

The employee will be excused when he notifies the Employer that death has occurred in his immediate family and that he wishes to be excused.

Time off with pay as provided in this section is intended to be used for the purpose of handling necessary arrangements and attending the funeral of the deceased member of the family. If the employee does not attend the funeral of the deceased, pay allowance as provided herein, will not be allowed.

Immediate family for the purpose of this section is defined as mother, father, spouse, son, daughter, brother, sister, mother-in-law or father-in-law.

ARTICLE XXIII

The following minimums shall become effective as indicated in Schedule "A" except those minimums for optometrists, errand boys, receptionists, office staff, clerical employees, mail clerks, machinists, machine maintenance and rebuilding, as mentioned hereinafter, shall become effective as of April 30, 1973.

(a) The minimum wage for Optometrists shall be \$375 per week.

(b) Minimum wage for Benchmen, Quality Control, Surface grinders, and RX personnel who also do bench work or who have dispenser's license and work as a dispenser, shall be \$250 per week. However, RX clerks who do not work as a Benchman but may be required by the employer to dispense under a permit, his minimum wage shall be \$175 per week effective April 30, 1973, and he shall receive no further increases after he reaches \$175. Starting rate for beginners shall be \$110 per week with a \$6.00 per week increase every three (3) months until they have

received the minimum wage as hereinabove required.

16a

(c) Minimum wage for Dispensers (Delivery & Sales) shall be \$250 per week.

Apprentice Dispensers who are unlicensed and who work under permits shall receive a starting rate of \$110 per week. Such apprentice dispensers shall receive an increase of \$6.00 per week at the end of every three (3) month period of employment until he has reached the minimum wage as hereinabove required. If such apprentice dispenser has not received his license after three (3) years of employment by the Employer, he may be discharged by the Employer. However, should an Apprentice Dispenser receive his license before he reaches \$175 per week, he shall immediately be brought up to \$175 per week and he shall receive periodical increases of \$6.00 per week every three (3) months until he has reached the minimum provided hereinabove for experienced dispensers.

Starting rate for beginners with license shall be \$175 per week with a \$6.00 per week increase every three (3) months until they have reached the minimum wage of \$250 per week.

(d) New Receptionists, Office Staff and Clerical Employees and Mail Clerks' minimum wage shall be no less than \$90 per week on April 30, 1973. Receptionists, Office Staff, Clerical Personnel and Mail Clerks hired after April 30, 1973 shall, after working twelve (12) months, receive \$95 per week, after working twenty-four (24) months, receive \$100 per week and after working thirty (30) months receive \$110 per week.

Starting rate for apprentice Stock Clerks shall be \$100 per week, and they shall receive \$4.00 every three (3) months until they reach the minimum wage of \$140 per week and they shall not be entitled to any general wage increases. Presently employed stock clerks earning less than \$130 per week shall receive an increase of \$4.00 per week every three (3) months until they reach the minimum wage and they shall not be entitled to any general wage increase. Presently employed stock clerks earning \$130 per week or more shall only receive the general wage increase indicated in Exhibit "A".

(e) Minimum wage for Machinists and Machine Maintenance and Rebuilding shall be \$155 per week on April 30, 1973, and at the end of one (1) year of service \$165 per week, and after two (2) years of service \$175 per week. Presently employed Machinists and Machine Maintenance and Rebuilding shall receive only general wage increases. Starting rate for Apprentice Machinists and Machine Maintenance and Rebuilding will be \$100 per week with a \$4.00 per week increase every three (3) months until they reach the minimum wage as herein provided.

(f) Minimum wage for Errand Boys shall be \$85 per week. Errand Boys working at 160 Jay Street, Brooklyn, New York, will continue to do Porter's work as in the past.

(g) The Employer agrees that should any matters arise where there are no rates or minimums established herein, the Union and the Employer shall negotiate for new rates and minimums. Failing to reach an agreement, the matter shall then be referred to arbitration as herein provided.

(h) Minimum wages for all of the categories in the bargaining unit for the period April 30, 1973 until April 30, 1976 shall be those indicated in Exhibit "a", except, however, that apprentices hired during the term of this Agreement shall receive the starting rate as provided hereinabove in the minimums that become effective in accordance with Exhibit "A" and they shall receive those periodical increases provided for in their respective categories during the term of this Agreement.

Such apprentices shall not be entitled to any other increases mentioned herein during the term of this Agreement.

(i) All employees presently employed shall receive general wage increases as indicated in the Schedule in Exhibit "A" during the term of this Agreement.

17a

ARTICLE XXIV

Paid vacations shall be given to employees in accordance with the following schedule and shall be computed as of May 1st in any given year:

6-12 months - 1 week
12 months to 3 years - 2 weeks
3 years or over - 3 weeks
10 years or over - 4 weeks

Employees shall take their respective vacations at such time or times as may be fixed by the Employer. The summer months for all employees hereunder shall extend from May 1st through September 30th of any given year.

An employee shall receive an extra day's vacation or shall be paid an extra day's pay for a paid holiday which falls within his vacation period.

Paid vacations shall be given to those employees who are working on May 1st of any year and shall be computed on the basis of continued employment prior to that date, as per following schedule, except laid-off employees or discharged employees shall receive accrued vacation pay up till the time of discharge or lay-off. Employees who for any reason are absent from work for more than thirty (30) days during the vacation year and who are working on May 1st of the vacation year shall receive only pro-rated vacation pay.

The employer agrees to post on the bulletin board summer vacation schedules on May 1st of each year, and winter vacation schedules on October 15th of each year, and such vacations shall be granted on a seniority basis in each department wherever management finds it can be done consistent with and does not interfere with the operation of the business.

(a) Any persons entitled to three (3) weeks vacation shall receive two (2) weeks during the summer months and one (1) week during the winter months.

Any person entitled to four (4) weeks' vacation shall receive two (2) weeks during the summer months and two (2) weeks during the winter months except, however, the employer may require such employee to accept one (1) week vacation pay instead of the fourth week's vacation.

(b) Persons entitled to two (2) weeks vacation shall receive one (1) week during the summer months and one (1) week during the winter months, except that any personnel that wishes to have two (2) consecutive weeks during the winter months must inform management not later than May 15th of each vacation period in any one year.

(c) All personnel eligible for only one (1) weeks vacation will be granted one (1) week vacation during the winter months.

(d) It is agreed that after the completed vacation schedule is posted, employees scheduled vacation-period will not be changed.

ARTICLE XXV

(a) This Agreement shall constitute the entire agreement between the Employer and the Union and all other agreements made prior to the execution of this Agreement whether oral or written are hereby declared null and void.

(b) There shall be no discrimination against any employee because of his acting as an officer of the Union, Steward, Committeeman.

(c) Special employees are not included within the bargaining unit. Special employees are those part-time employees who do not work more than one day per week. Special employees shall also include Receptionists, Office Staff, Clerical Workers and Mail Clerks working twenty (20) hours per week or less, except those employed on or before April 29th, 1973 who shall remain Special employees if they work twenty-four (24) hours per week or less.

18a

Receptionists, Office Staff, Clerical Workers and Mail Clerks who will be hired for more than twenty (20) hours per week only, and only for the months of June, July, August and September, shall be required to join the Union, to pay dues, but no initiation fee. They must also obtain a Registration Slip and register with the Union as provided for in Article III, Subdivision (c).

(d) Employees who are serving customers at closing time shall continue such service, if so required, for 15 minutes after closing time without additional compensation. If such services are rendered in excess of 15 minutes after closing, the employees are to receive credit for the entire time so spent and shall receive compensatory time off.

(e) Employer at its discretion shall determine the time of lunch hours for employees providing same conforms to law.

(f) The Employer shall have full and complete right to set up policy for the employees in the unit, to assign duties, to issue instructions so long as such policies, duties and instructions conform with the laws governing the practice of optometry and optical dispensing.

(g) The Union shall in no way interfere with the service relationship of the optometrists and dispensers with the customers of the employer or with the nature of performance of any service such as optometrist or opticians perform for such customers.

(h) Supervisory and executive employees may be assigned to duties normally performed by those within the bargaining unit.

(i) The Employer shall have the full and complete right to direct the working force; to control plant operations; to schedule and assign work; to require employees to observe rules, and to determine the means, methods and processes of production and such other rights as are usually Management's function. The exercise of these rights shall not derogate any of the provisions of this Agreement.

ARTICLE XXVI

(a) Part-time employees are defined as those not working over the following respective number of hours in any work week;

Optometrists and Dispensers	- 32 hours
Shopmen	- 30 hours

(b) Employer has sole discretion in determining number of hours in any work week which a part-time employee shall work not to exceed the number of hours as specified in Paragraph (a) of this Article.

(c) Anything to the contrary notwithstanding part-time employees during the months of June to September inclusive in any year, or in the event of emergencies, in any sixty (60) working days may exceed their respective weekly maximum hours, not to exceed the full time weekly hours, without becoming full time employees.

(d) Part-time employees as among themselves only shall be entitled to seniority.

(e) Employer has discretion in designating full time employees from the ranks of part-time employees. The Employer agrees to consider seniority for this purpose.

(f) At Employer's discretion, part-time employees may be paid up to 20% above the wage scale.

(g) All part-time employees shall receive the same benefits embodied in this Agreement, in the same manner as full time employees. However, it is agreed that all benefits shall be paid on the basis of their average weekly earnings.

ARTICLE XXVII

No employee shall be transferred from one Branch to another without the consent of the employee or employees involved. Such employees shall still retain their seniority from the Branch from which such Employees have been transferred provided, however, that such transfer or transfers were made for the convenience of Management.

In the event the Employer chooses to close a Branch in which such persons were transferred to, such persons shall return to whatever branch in which they have established their original seniority rights from the last date of hire with the Company.

ARTICLE XXVIII

It is agreed by and between the Parties that whereas the Employer send work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments.

ARTICLE XXIX

The Employer agrees to continue the Pension Plan for all employees in the Bargaining Unit who are on the payroll on April 30, 1973, except those receptionists, errand boys, mail clerks and stock clerks in the Bargaining Unit who have been employed for less than one (1) year--and they will be covered after one (1) year of employment. The Employer shall make no contributions on behalf of part-time employees who are employed elsewhere in the optical field.

(a) All new employees hired after April 29, 1973 in the categories only of receptionists, errand boys, mail clerks and stock clerks shall not be covered by the Pension Plan until they have been employed for a period of one (1) year. All other employees hired after April 29, 1973 shall be covered.

(b) The Employer agrees that he will contribute as of April 30, 1973, the sum of eighty (80¢) cents per day but not to exceed \$4.00 per week for employees covered by the Pension Plan to United Optical Workers Pension Fund. The said Fund shall be composed of an equal number of Employer and Union Trustees.

(c) Effective November 1, 1974, the Employer agrees that he will contribute the sum of ninety-six (96¢) per day not to exceed \$4.80 per week for employees covered by the Pension Plan of the United Optical Workers Pension Fund. The said Fund shall be composed of an equal number of Employer and Union Trustees.

In the event of any default in payment by the Employer, the cost of expenses or arbitration fees and attorneys' fees shall be borne by the Employer.

In the event of any default in payment by the Employer, and Fund must sue to enforce payment, the cost and expenses, in-

cluding attorneys' fees shall be borne by the Employer.

20a

ARTICLE XXX

(a) If prior to sixty (60) days before the expiration of this Agreement neither of the Parties hereto submits new demands in writing of notice of their intention not to renew this Agreement same shall continue in full force and effect for each successive year.

(b) The Union agrees that it will not assign this Agreement to any other Local Union or any other International Union, during the life of this Agreement.

(c) This Agreement shall be for a period of three (3) years effective April 30, 1973, and shall continue in full force and effect until April 30, 1974 and it shall be binding on the Parties hereto. This Agreement sets forth all the terms and conditions covering the relationship between the Parties. All other demands made and discussed by the Union during negotiations leading up to this Agreement are withdrawn.

UNITED OPTICAL WORKERS' UNION
LOCAL #408, IUE, AFL-CIO

STERLING OPTICAL CO., INC.

By: 

For the Union

By: 

For the Employer

EXHIBIT "A"

Effective April 30, 1973

WAGE INCREASES

The general wage increases to employees presently employed shall be:

FOR OPTOMETRISTS

\$25 per week, April 30, 1973
 \$25 per week, May 6, 1974
 \$25 per week, May 5, 1975

FOR BENCH, SURFACE, RX PERSONNEL WHO ALSO DO BENCH WORK
 OR WHO HAVE A DISPENSER'S LICENSE AND WORKS AS A DISPENSER,
 QUALITY CONTROL AND DISPENSERS (SALES AND DELIVERIES)

\$15 per week, April 30, 1973
 \$15 per week, May 6, 1974
 \$10 per week, Nov. 4, 1974
 \$10 per week, May 5, 1975

FOR MACHINISTS, MACHINE MAINTENANCE AND REBUILDING

\$15 per week, April 30, 1973
 \$10 per week, May 6, 1974
 \$15 per week, May 5, 1975

FOR RECEPTIONISTS, OFFICE STAFF, CLERICAL PERSONNEL
 AND MAIL CLERKS, FOR EMPLOYEES WITH FIVE (5) OR MORE
 YEARS OF SERVICE

\$10 per week, April 30, 1973
 \$ 5 per week, May 6, 1974
 \$ 7 per week, May 5, 1975

FOR EMPLOYEES WITH MORE THAN TWO (2) YEARS SERVICE
 BUT LESS THAN FIVE (5) YEARS OF SERVICE

\$8 per week, April 30, 1973
 \$5 per week, May 6, 1974
 \$7 per week, May 5, 1975

FOR EMPLOYEES WITH LESS THAN TWO (2) YEARS OF SERVICE

\$6 per week, April 30, 1973
 \$5 per week, May 6, 1974
 \$7 per week, May 5, 1975

Presently employed receptionists who are earning
 less than \$90 per week after receiving their initial
 wage increases on April 30, 1973 shall be brought up to
 \$90 per week.

FOR STOCK CLERKS EARNING \$130 PER WEEK OR MORE AS
 OF APRIL 30, 1973

\$10 per week, April 30, 1973
 \$10 per week, May 6, 1974
 \$ 5 per week, Nov. 4, 1974
 \$ 5 per week, May 5, 1975

FOR ERRAND BOYS:

\$6 per week, April 30, 1973
 \$6 per week, May 6, 1974
 \$4 per week, May 5, 1975
 \$3 per week, Nov 3, 1975

FOR APPRENTICES:

Apprentices shall be entitled only to an initial wage in-
 crease of \$6.00 per week on April 30, 1973 and will receive
 the next periodical apprentice increase three (3) months there-
 after, except those apprentice stock clerks, apprentice
 machinists, machine maintenance and rebuilding, who shall
 be entitled only to an (continued on next page)

initial wage increase of four dollars (\$4.00) per week on April 30, 1973 and will receive the next periodical apprentice increase three (3) months thereafter.

MINIMUM WAGES

The following minimum wages for the following categories shall go into effect on the month, day and year mentioned hereinafter:

OPTOMETRISTS

Apr. 30, 1973, \$375 per week

DISPENSERS (SALES & DELIVERIES) AND SHOPMEN AND RX (WHO ALSO DO BENCH WORK OR HAVE A DISPENSER'S LICENSE AND WORKS AS A DISPENSER,) QUALITY CONTROL, SURFACE GRINDERS

Apr. 30, 1973, \$215 per week

May 6, 1974, \$230 per week

Nov. 4, 1974, \$240 per week

May 5, 1975, \$250 per week

RECEPTIONISTS, OFFICE STAFF, CLERICAL PERSONNEL AND MAIL CLERKS

Starting Minimum- Apr. 30, 1973, \$90 per week

New receptionists, office staff, clerical personnel and mail clerks hired after Apr. 29, 1973, shall after working twelve (12) months receive \$95 per week, after working twenty-four (24) months receive \$100 per week, and after working thirty (30) months receive \$110 per week.

STOCK CLERKS

Apr. 30, 1973, \$140 per week

Starting rate for apprentice stock clerks shall be \$100 per week and they shall receive a \$4 increase every three (3) months until they reach the minimum wage of \$140 per week and they shall not be entitled to any general wage increases.

Presently employed stock clerks earning less than \$130 per week shall receive a \$4 increase every three (3) months until they reach the minimum wage and they shall not be entitled to any general wage increases. Presently employed stock clerks earning \$130 per week or more shall only receive the general wage increases.

ERRAND BOYS

Minimum wages for Errand Boys shall be \$85 per week on Apr. 30, 1973

MACHINISTS, MACHINE MAINTENANCE AND REBUILDING

Minimum wage shall be \$155 per week on April 30, 1973

At the end of one (1) year of service, \$165 per week

At the end of two (2) years of service, \$175 per week.

Presently employed to receive only general wage increases.

APPRENTICE MACHINISTS, MACHINE MAINTENANCE AND REBUILDING

Starting rate shall be \$100 per week and they shall receive a \$4 increase every three (3) months until they have reached the minimum wage of ~~\$175~~ per week and they shall not be entitled to any general wage increases.

It is fully understood and agreed that employees in the employ of the Employer as of Apr. 30, 1973, after having received initial wage increases, and are not earning the minimum wage as specified in the schedules as they appear in Exhibit "A" shall continue to receive periodical increases as specified in their respective categories every three (3) months until they have reached the minimum wage in effect on the date they have received their last periodical increase; and thereafter shall continue to receive wage increases in the same manner as all other employees, as they appear in the Exhibit "A" schedule.

New employees hired after the signing of this Agreement shall be paid no less than the starting minimum wage, as indicated in the schedule of Minimum Wages. Such persons shall continue to receive thereafter periodical increases as specified in their respective categories every three (3) months until they have reached the minimum wage schedule in effect on the date they received their last periodical increase; and thereafter shall continue to receive wage increases in the same manner as all other employees, as they appear in the Exhibit "A" schedule.

UNITED OPTICAL WORKERS' UNION
LOCAL #408, IUE, AFL-CIO

STERLING OPTICAL COMPANY INC.

By 

For the Union

By 

For the Employer

EXHIBIT B ANNEXED TO COMPLAINT
DEMANDS TO ARBITRATE

SIPSER, WEINSTOCK, HARPER & DORN
ATTORNEYS AT LAW

380 MADISON AVENUE
NEW YORK, N. Y. 10017.

(212) 667-2100

ALAN R. HOWE
ADMITTED TO
PRACTICE IN PENNSYLVANIA
1010 BANKERS SECURITIES BUILDING
PHILADELPHIA, PA. 19107
(215) 732-0705

PHILIP SIPSER
HARRY WEINSTOCK
ETHEL HARPER
RICHARD L. DORN
LEONARD LEIBOWITZ

SIDNEY S. BERMAN
ROBERT M. ZISKIN
DONALD E. KLEIN
ELMER H. BEBERFALL



September 20, 1973

Sterling Optical Co., Inc.
3000 Marcus Avenue
Lake Success, New York

Attention: Mr. Samuel Gelb

Gentlemen:

On behalf of the United Optical Workers Union,
Local 408, IUE, AFL-CIO, arbitration is demanded of the
issues set forth on the annexed schedule.

We request that you agree to submit these issues
to arbitration forthwith. It is further requested that
pending the hearing and determination by the arbitrator,
the Company shall refrain from subcontracting out bargain-
ing unit work; terminating its laboratory at 160 Jay Street,
Brooklyn, New York, and from laying off or terminating any
employees, and from all other actions which may render any
award of the arbitrator meaningless.

Please advise us immediately of your answer to
the above so that this case may be processed forthwith.

Very truly yours,

SIPSER, WEINSTOCK, HARPER & DORN

By: Robert M. Ziskin

RMZ:lmc
BY HAND

September 24, 1973

Sterling Optical Co., Inc.
3000 Marcus Avenue
Lake Success, New York 11040

Attention: Mr. Samuel Gelb

Gentlemen:

On behalf of the United Optical Workers Union,
Local 400, IUE, AFL-CIO, arbitration is demanded of the
issues set forth on the annexed schedule.

We request that you agree to submit these issues
to arbitration forthwith. It is further requested that
pending the hearing and determination by the arbitrator,
the Company shall refrain from subcontracting out bargain-
ing unit work; terminating its laboratory at 160 Jay Street,
Brooklyn, New York, and from laying off or terminating any
employees, and from all other actions which may render any
award of the arbitrator meaningless.

Please advise us immediately of your answer to
the above so that this case may be processed forthwith.

Very truly yours,

SIPSER, WEINSTOCK, HARPER & DORN

RMZ/tr

By:

Robert M. Ziskin

REGISTERED MAIL-RRR

United Optical Workers Union, Local 408, IUE, AFL-CIO (hereinafter referred to as the "Union") demands arbitration of the following items of difference between the parties:

1. May the Employer, during the life of its agreement with the Union, by virtue of its subcontracting out of laboratory work performed by bargaining unit employees at 160 Jay Street, Brooklyn, New York, improperly destroy, sever and nullify a part or portion of the collective bargaining unit, in violation of Articles I and II of the parties' contract, among others set forth below, and if so, to what damages and/or injunctive relief is the Union entitled, to remedy said violation?
2. May the Employer, during the life of its agreement with the Union, without discussion and/or consent of the Union, subcontract out laboratory work performed by bargaining unit employees employed at the Brooklyn Plant, in view of the provisions of its contract contained in Articles I, II, and IV of the parties' contract?
3. May the Employer, during the life of its agreement with the Union, subcontract out laboratory work performed by bargaining unit employees at the Brooklyn Plant causing the layoff of said employees, solely for the purpose of producing its products at a lesser rate of pay and a cheaper cost, in violation of Article XXIII and Schedule A at pages 13, 14, and 15 of the parties' contract?
4. Is the Employer, since on or about September 14, 1973 and continuing thereafter, improperly laying off its laboratory employees at its Brooklyn Plant in violation of Articles I, II, IV, and XVI of the parties' contract?
5. May the Employer, during the life of its agreement with the Union, subcontract out laboratory work performed by bargaining unit employees at its Brooklyn Plant thereby depriving the Union of its jurisdiction over the work presently performed in and out of the Employer's Brooklyn Plant, in violation of the specific provisions set forth in Article I of the parties' contract?
6. Is the Employer, since on or about September 14, 1973 and continuing thereafter, improperly discharging or otherwise terminating the laboratory employees at its Brooklyn Plant in violation of Articles I, II, IV and IX of the parties' contract?
7. Is the Employer, since on or about September 14, 1973 and continuing thereafter, improperly depriving its

laboratory employees at its Brooklyn Plant of their earned seniority rights in violation of Article IV of the parties' contract?

8. Is the Employer's layoff of its laboratory employees resulting from its subcontracting out of laboratory work performed at its Brooklyn Plant, a violation of the vacation provisions set forth in Article XXIV of the parties' contract?

9. Is the Employer's layoff of its laboratory employees resulting from its subcontracting out of laboratory work performed at its Brooklyn Plant, a violation of the holiday provisions set forth in Article VII of the parties' contract?

10. Is the Employer's layoff of its laboratory employees resulting from its subcontracting out of laboratory work performed at its Brooklyn Plant, a violation of the transfer provisions of Article XXVII of the parties' contract?

11. Is the Employer's layoff of laboratory employees resulting from its subcontracting out of laboratory work performed at its Brooklyn Plant, otherwise depriving said employees of their Insurance Fund Benefits set forth in Article XXI of the parties' contract?

12. Is the Employer obligated, notwithstanding its intention of subcontracting out laboratory work performed by its Brooklyn Plant employees, to continue payments to the United Optical Workers Insurance Fund for a minimum of the contract period, and in any event, what is the Employer's obligation to continue such payments on behalf of employees not working because of non-compensable illness or injuries, or as a result of compensable injuries up to the issuance of a fund award of the Workmen's Compensation Board?

13. Is the Employer obligated, notwithstanding its intention of subcontracting out laboratory work performed by its Brooklyn Plant employees, to contribute to the United Optical Workers Pension Fund, a sum equal to the amount actuarially computed and determined to guarantee to each of the aforesaid employees to be laid off a fully funded pension benefit?

14. Is the Employer, by virtue of its plan to subcontract out laboratory work performed by its Brooklyn Plant employees, improperly terminating its contract with the Union prior to its expiration date, in violation of Article XXX of the parties' contract?

15. Is the Employer violating Article XXVIII of the parties' contract, by subcontracting out laboratory work

performed by bargaining unit employees at the Brooklyn Plant to non-union establishments?

If the Employer has violated its obligations or any of them, as aforesaid, is the Union and the employees entitled to damages and/or injunctive relief, restraining the Employer from subcontracting out laboratory work performed by its Brooklyn Plant bargaining unit employees; from transferring or contracting out its laboratory operation at its Brooklyn Plant; from closing, suspending or discontinuing its laboratory operation at its Brooklyn Plant; from depriving the Union of its jurisdiction over laboratory work performed in and out of the Employer's Brooklyn Plant; from interfering with and otherwise abrogating seniority rights of bargaining unit laboratory employees at its Brooklyn Plant; from laying off its laboratory employees at its Brooklyn Plant and from otherwise terminating their employment; from interfering with and/or abrogating its agreed vacation and holiday pay with regard to its Brooklyn Plant laboratory employees; from refusing to make appropriate contributions to the Union's Insurance Fund; from refusing to make appropriate contributions to the Union's Pension Fund; from terminating its contract with the Union prior to its stated expiration date; and for such other restraining or affirmative relief as to the Arbitrator under all of the facts and contract may seem just and proper.

Dated: September 21, 1973

SIPSER, WEINSTOCK, HARPER & DORN
On Behalf of United Optical
Workers Union, Local 408, IUL, AFL-CIO

By: Robert M. Ziskin
Robert M. Ziskin

TEMPORARY RESTRAINING ORDER AND
ORDER SETTING DATE FOR HEARING ON
MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the INTER-
NATIONAL UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS, AFL-CIO,

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.
-----x

73C 1444

TEMPORARY RESTRAINING
ORDER AND ORDER SETTING
DATE FOR HEARING ON
MOTION FOR PRELIMINARY
INJUNCTION PURSUANT TO
RULE 65, FEDERAL RULES
OF CIVIL PROCEDURE

Plaintiff having filed its complaint with this Court under 29 USC §185 on September 25, 1973, for a declaration that the defendant has violated the contract between the parties by refusing to proceed with the arbitration of disputes between them and for an order directing and compelling the defendant to arbitrate the issues that have arisen between the parties as a result of the plan of the defendant to subcontract out its laboratory operation at its plant at Brooklyn, New York, on or about September 28, 1973, with loss of employment, salary, pensions and other benefits to more than 36 employees and for an injunction against the defendant's subcontracting out its laboratory operation at its plant at Brooklyn, New York, or partially closing its facilities in Brooklyn, New York, or terminating its laboratory operations thereat prior to the completion of the arbitration of the issues that have arisen between the parties, and the arbitrator's award determining such issues,

And it appearing from the annexed affidavit of Sebastian J. Rebaldo, in support of the motion for Preliminary

30a

Int. ... demanded arbitration of various issues on September 21 and 24, 1973, and that the defendant has not acted so as to enable the arbitration to commence and be complete prior to September 28, 1973, when the defendant proposes to terminate and close down its laboratory operations at its Brooklyn plant,

And the plaintiff having filed, ex parte, a motion for a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure, and the defendant having been afforded an opportunity to be present and be heard

And it appearing that the defendant is engaged in closing down its laboratory operations at its Brooklyn plant and terminating the employment of its laboratory employees, which if carried out prior to the rendering of the award of an arbitrator could not be adequately corrected by such award, it is

ORDERED, that a hearing before this Court will be held at ^{East} Room 5, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on Sept 26, 1973, at 2:00 P.M. o'clock on plaintiff's motion for a Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure; and it is further

~~ORDERED, that service of a copy of this Order, the annexed affidavit and Motion for Preliminary Injunction, and the Complaint be made upon the defendant at its offices at 160 Jay Street, Brooklyn, New York, or at its place of business at 3000 Marcus Avenue, Lake Success, New York, on or before o'clock September 1973, and it is further~~

31a
ORDERED, that pending the hearing on plaintiff's motion for a preliminary injunction, the defendant is restrained from subcontracting out its laboratory operations at its plant located at 160 Jay Street, Brooklyn, New York, or terminating its laboratory operations at its Brooklyn, New York plant, or ceasing its normal business operations thereat; and it is further

ORDERED, that plaintiff file a bond in the sum of \$, on or before o'clock, September 1973 as security for the payment of such costs and damages as may be incurred or suffered by the defendant in the event it shall be found to have been wrongfully enjoined or restrained.

Dated: Brooklyn, New York
September 25, 1973.
3:30 P.M.

James H. [Signature]
U.S.D.J.

MOTION FOR PRELIMINARY INJUNCTION
PURSUANT TO RULE 65, FEDERAL RULES
OF CIVIL PROCEDURE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

32a

-----x
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the INTER-
NATIONAL UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS, AFL-CIO,

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.
-----x

:
:
:
:
: MOTION FOR PRE-
: LIMINARY INJUNCTION
: PURSUANT TO RULE 65,
: FEDERAL RULES OF
: CIVIL PROCEDURE.

S I R S :

PLEASE TAKE NOTICE that the undersigned, attorneys
for the Plaintiff make this motion for a Preliminary In-
junction:

Directing and compelling Defendant to arbi-
trate the issues that have arisen between the parties.

Enjoining the Defendant from subcontracting
out its laboratory operation at its plant located
at 160 Jay Street, Brooklyn, New York, or terminating
its laboratory operation at its Brooklyn, New York
plant, or ceasing its normal business operations
thereat prior to the completion of the arbitration
of the issues between the parties and the arbi-
trator's award determining such issues.

Dated: New York, New York
September 24, 1973.

Yours, etc.

SIPSER, WEINSTOCK, HARPER & DORN
Attorney for Plaintiff
380 Madison Avenue
New York, N.Y. 10017

(212) 867-2100

AFFIDAVIT OF SEBASTIAN J. REBALDO IN
SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the INTER-
NATIONAL UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS, AFL-CIO,

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.

:
:
:
:
: AFFIDAVIT IN
SUPPORT OF
: MOTION FOR
PRELIMINARY
: INJUNCTION

-----x
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SEBASTIAN J. REBALDO, being duly sworn, deposes
and says:

I am Business Manager of the UNITED OPTICAL
WORKERS UNION, LOCAL 408, affiliated with the INTERNATIONAL
UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO (herein-
after "Local 408"), the collective bargaining representative
of among others, the bench, surface, Rx clerks, machinists,
machine maintenance and rebuilding employees, quality control,
stock clerks, dispensers, errand boys, optometrists, reception-
ists, office staff, clerical personnel, and mail clerks employed
by STERLING OPTICAL COMPANY, INC. (hereinafter "Sterling") at
its various places of business including but not limited to
3000 Marcus Avenue, Lake Success, New York, 160 Jay Street,
Brooklyn, New York, 138 Fulton Street, New York, New York,
Yonkers, New York and Hempstead, New York.

On or about September 17, 1973 in the midst of the
term of a collective bargaining agreement, which does not
expire until April 30, 1976, Sterling announced that it had

unilaterally determined to subcontract out its laboratory work (i.e. the fabrication of lenses) which work has at all times material herein, been performed by bargaining unit employees employed at 160 Jay Street, Brooklyn, New York, to independent establishments. Despite the fact that the determination to subcontract out the previously described laboratory work if carried out will result in the unemployment of approximately 36 bargaining unit employees and further result in the possible closing of the Jay Street operation, Local 408 was neither notified nor otherwise consulted in advance that such a decision was contemplated or otherwise being implemented by Sterling.

Since Sterling announced its decision to subcontract out the aforementioned laboratory work at its Brooklyn plant, it has during the period September 14 through 21, 1973, laid off 19 of the 36 bargaining unit employees performing such work.

I have been advised that the decision of Sterling to subcontract out the aforementioned bargaining unit work in the middle of the term of an existing collective bargaining agreement is a violation of said agreement. The items sought to be arbitrated concern whether Sterling has violated provisions of the collective bargaining agreement, among others, the subcontracting out of bargaining unit work, recognition, jurisdiction of the Union, seniority, layoff, discharge or other termination of employees, welfare, pensions, vacations and duration of the agreement. Sterling has denied that such violations have taken place.

Accordingly, in connection with the grievance and³⁵ arbitration machinery provided for in the collective bargaining agreement, on September 21, 1973, I served upon Sterling the

demand for arbitration which is attached to the Complaint. In addition, on September 24, 1973, a copy of the aforementioned demand for arbitration was served upon Sterling, by registered mail.

Although Sterling has announced its intention to layoff all of its laboratory employees at its Brooklyn plant by on or about September 28, 1973, it has taken no steps to cooperate to bring the matter to arbitration before that date.

Whether or not the Union is correct that Sterling's previously described later decision to subcontract out bargaining unit work is a breach of the collective bargaining agreement, is a question for an arbitrator to decide as are the other issues included in the demand for arbitration. If Sterling is permitted to subcontract out the previously described bargaining unit work and close down its Brooklyn laboratory on or before September 28, 1973 without the previously described issues having been resolved by arbitration, the employees whose employment will be terminated will suffer losses of income, loss of pension rights and other benefits and suffer irreparable injury, which no arbitration award could correct. Plaintiff, therefore, moves for a Temporary Restraining Order and a Preliminary Injunction pursuant to Rule 65, of the Federal Rules of Civil Procedure:

directing and compelling the defendant to arbitrate the issues that have arisen between the parties;

enjoining the defendant from subcontracting out ^{36a}
laboratory work performed at its Brooklyn plant, or
laying off its laboratory employees at its Brooklyn
plant, or ceasing its normal business operation
thereat prior to the completion of the arbitration
of the issues that have arisen between the parties
and the arbitrator's award determining such issues.

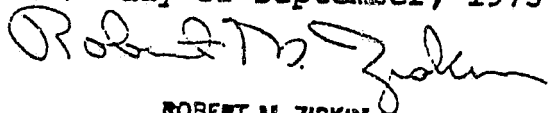
At present, the defendant is engaged in taking such
steps as it may deem necessary to subcontract out its previously
described laboratory work and terminating the employment of its
laboratory employees. Accordingly, a Temporary Restraining
Order maintaining the status quo pending the hearing on this
matter is requested.

No prior application for this or similar relief has
been made to any Court or Judge.



Sebastian J. Rebaldo

Sworn to before me this
24th day of September, 1973.



ROBERT M. ZISKIN
NOTARY PUBLIC, State of New York
No. 9382515
Qualified in Nassau County
Commission Expires March 30, 1974

ORDER OF MISHLER, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO,

73 Civil 1444

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.

The plaintiff having moved for a temporary restraining order* and Sipser, Weinstock, Harper & Dorn, Esqs. (Robert M. Ziskin, Esq., of counsel) having appeared for the plaintiff, and Parker, Chapin & Flattau, Esqs. (John E. Jay, Esq.) having appeared for the defendant, and the court having found that for the purpose of this motion that Article XXVIII is violative of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e)

AND the court further being satisfied that damage and inconvenience to the defendant in issuing an order restraining the sub-contracting would be greater than the damage to the plaintiff in denying such relief,

NOW THEREFORE, it is

ORDERED that the motion be and the same hereby is
denied.

Motion for a preliminary injunction is set down for
hearing for Friday, October 5, 1973 at 2:00 P. M.

Brooklyn, New York
September 28, 1973 at 2:30 P.M.

Isaac Mishkin
U. S. D. J.

*

Plaintiff declined the Court's offer for a hearing on the return
day of the motion for a preliminary injunction.

J. 17

ANSWER WITH COUNTERCLAIM

-----X
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO,

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.
-----X

ANSWER WITH
COUNTERCLAIM

73 Civil 1444 (J.M.)

Defendant, by Parker, Chapin and Flattau, its
attorneys, for its answer:

1. Admits the allegations contained in the
paragraph of the complaint marked "FIRST" except denies
that the defendant operates an optical laboratory located
at 138 Fulton Street, New York, New York.

2. Denies the allegations contained in the
paragraphs of the complaint marked "EIGHTH", "THIRTEENTH",
and "FIFTEENTH".

As a First Affirmative Defense, alleges:

3. Article XXVIII of the collective bargaining
agreement between plaintiff and defendant, is illegal and
void and unenforceable in that it is in violation of Section
8(e) of the National Labor Relations Act, as amended, 29
U.S.C. Section 158(e) insofar as it limits defendant's right
to subcontract only to those establishments under contract
with the Union.

As a Second Affirmative Defense, alleges: 40a

4. Defendant will suffer greater damage and inconvenience if an order restraining the subcontracting by defendant is issued than the damage to plaintiff if said injunctive relief is denied.

COUNTERCLAIM

5. This is an action for a declaratory judgment under the Declaratory Judgments Act, 28 U.S.C. Section 2201 et seq. and is brought because there is an actual controversy now existing between the parties to the above entitled action as to which defendant seeks the judgment of this Court.

6. Defendant and plaintiff are parties to a collective bargaining agreement, effective from April 30, 1973, until April 30, 1976, which provides in Article XXVIII:

"It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon signing of this Agreement, all said work shall be sent to Union establishments."

7. The foregoing Article XXVIII is illegal, void and unenforceable by virtue of Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158(e), insofar as it limits defendant's right to subcontract only to those establishments under contract with plaintiff.

8. Plaintiff seeks to give effect to said Article XXVIII by means of the grievance and arbitration procedure prescribed in the collective bargaining agreement and pursuant thereto has demanded arbitration of a claim to the effect that plaintiff has violated its obligation under said Article XXVIII.

9. Plaintiff seeks to give effect to said Article XXVIII by a Motion for Preliminary Injunction pursuant to Rule 65, Federal Rules of Civil Procedure:

"Directing and compelling defendant to arbitrate the issues that have arisen between the parties.

Enjoining the defendant from sub-contracting out its laboratory operation at its plant located at 160 Jay Street, Brooklyn, New York or terminating its laboratory operations at its Brooklyn, New York plant, or ceasing its normal business operations thereat prior to the completion of the arbitration of the issues between the parties and the arbitrator's award determining such issues."

10. Defendant has advised plaintiff that the controversy with respect to its compliance with Article XXVIII is not arbitrable.

WHEREFORE, defendant respectfully prays for judgment:

1. Dismissing the complaint insofar as it seeks to compel arbitration of any issue or claim arising out of an alleged violation of Article XXVIII of the collective bargaining agreement.

2. Dismissing the complaint insofar as it seeks judgment that defendant has violated the collective bargaining agreement between the plaintiff and the defendant.

3. Declaring that Article XXVIII of the collective bargaining agreement between defendant and plaintiff is unenforceable and void insofar as it limits defendant's right to subcontract only to those establishments under contract with plaintiff; that the claim of plaintiff based on the alleged violation by defendant of the obligations purported to be imposed by said Article XXVIII presents no issue properly arbitrable under the terms of the

collective bargaining agreement; and to the extent lawful, Article XXVIII recognizes defendant's right to subcontract work covered by the collective bargaining agreement.

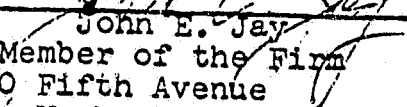
4. Restraining plaintiff from giving effect to said Article XXVIII and staying all arbitration proceedings to the extent they present claims of the plaintiff based on or arising out of any alleged violation by defendant of said Article XXVIII.

5. That defendant have costs of this action and such other, further and different relief as to the Court shall seem just and proper.

Dated: New York, New York
October 3, 1973

PARKER, CHAPIN and FLATTAU

BY


John E. Jay
A Member of the Firm
530 Fifth Avenue
New York, New York 10036
(212) 986-7200

ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED OPTICAL WORKERS UNION,	:	
LOCAL 408, affiliated with the	:	
INTERNATIONAL UNION OF ELECTRICAL,	:	73 Civ. 1444 (J.M.)
RADIO & MACHINE WORKERS, AFL-CIL,	:	
	:	
Plaintiff,	:	<u>ORDER TO SHOW CAUSE</u>
	:	
-against-	:	
	:	
STERLING OPTICAL COMPANY, INC.,	:	
	:	
Defendant.	:	

-----X

Upon the summons and complaint herein, the answer, the annexed affidavit of Samuel Gelb, sworn to the 3rd day of October, 1973, it is

ORDERED that the plaintiff, UNITED OPTICAL WORKERS UNION, LOCAL 408, affiliated with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, show cause at a hearing before the Honorable Jacob Mishler, to be held in ^{Court} Room 5, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on October 9, 1973, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made herein granting partial summary judgment in the defendant's favor dismissing the complaint insofar as it seeks judgment:

- (i) Declaring that the defendant has violated the contract between the plaintiff and defendant; and
- (ii) Directing and compelling the defendant to arbitrate any issue or claim based on or arising out of any alleged violation of Article XXVIII of the collective bargaining agreement between the parties; and

(iii) Restraining and enjoining the defendant from subcontracting out laboratory work performed by bargaining unit employees at its Brooklyn plant, closing the laboratory operations at the Brooklyn plant, or any portion thereof, laying off and/or terminating laboratory employees at its Brooklyn plant or discontinuing its normal business operations at its Brooklyn plant

on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

IT IS FURTHER ORDERED, that service of a copy of this order and of the papers upon which the same is granted, on Sipser, Weinstock, Harper & Dorn, attorneys for plaintiff, be made on or before October 4, 1973, ^{at 11:00 AM} in any manner provided by the Federal Rules of Civil Procedure, and that proof of such service be filed herein.

Dated: October 3, 1973

Brooklyn, New York
4:40 P.M.

B. Jacob Miller
U.S.D.J.

STATEMENT UNDER RULE 9 (g)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED OPTICAL WORKERS UNION,	:	73 Civ. 1444 (J.M.)
LOCAL 408, affiliated with the	:	
INTERNATIONAL UNION OF ELECTRICAL,	:	
RADIO & MACHINE WORKERS, AFL-CIO,	:	
Plaintiff,	:	STATEMENT UNDER
	:	<u>RULE 9(e)</u>
-against-	:	
STERLING OPTICAL COMPANY, INC.	:	
Defendant.	:	

-----X

The following material facts are undisputed:

1. This is an action under Title 29, United States Code, Section 185 to compel defendant to proceed to arbitration in accordance with Article VIII of the collective bargaining agreement between the parties.
2. Defendant is a corporation, organized and existing and doing business in the State of New York. Defendant operates optical shops located in Hempstead, Levittown, Huntington, Bay Shore, Jamaica, Staten Island, Brooklyn and New York City, New York and an optical laboratory at 160 Jay Street, Brooklyn, New York, and is engaged in an industry affecting interstate commerce within the meaning of Section 2(6) and 2(7) of the National Labor Relations Act, as amended ("Act"), 29 U.S.C. §152(6) and 152(7).
3. Plaintiff is a labor organization representing employees for collective bargaining purposes in an industry affecting interstate commerce within the meaning of §2(5) of the Act.
4. Jurisdiction is conferred on this Court by Title 29, United States Code, Section 185.

46a

5. Plaintiff is the sole and exclusive collective bargaining agent of the employees of defendant at its optical shops and its optical laboratory at 160 Jay Street, Brooklyn, New York.

6. The plaintiff and defendant are parties to a collective bargaining agreement effective from April 30, 1973, until April 30, 1976.

7. Article XXVIII of the collective bargaining agreement between the parties permits contracting by defendant but requires that subcontracting of work "be sent to Union establishments."

8. On or about September 15, 1973, plaintiff was advised that the defendant had decided to subcontract out the laboratory work being performed by defendant's employees at its Brooklyn laboratory located at 160 Jay Street, Brooklyn, New York, and that on or about September 28, 1973, defendant would discontinue the laboratory operation at its Brooklyn plant and terminate the employees then performing such work.

9. That the laboratory work which defendant decided to subcontract out effective on or about September 28, 1973, is the work theretofore performed by the employees at defendant's laboratory at 160 Jay Street, Brooklyn, New York, and but for such subcontracting, would have been performed by the employees at defendant's laboratory.

10. That the laboratory work which defendant decided to subcontract out effective on or about September 28, 1973; is covered by Article XXVIII of the collective bargaining agreement between the parties and is work which is required by said Article to "be sent to Union establishments."

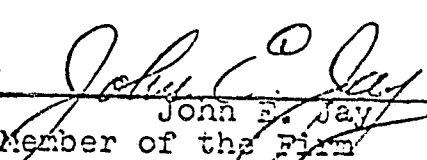
11. On or about September 21 and September 24, 1973, the plaintiff served defendant with the demand for arbitration, including, inter alia, the question of whether the foregoing subcontracting was in violation of Article XXVIII of the collective bargaining agreement.

12. The defendant has refused the demand of the plaintiff for arbitration insofar as it demands arbitration of any issue or claim based upon an alleged violation by defendant of Article XXVIII of the collective bargaining agreement.

Dated: New York, New York
October 3, 1973

PARKER, CHAPIN and FLATTAU

By


John F. Jay
A Member of the Firm
530 Fifth Avenue
New York, New York 10036
(212) 986-7200

AFFIDAVIT OF SAMUEL GELB IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the :
INTERNATIONAL UNION OF ELECTRICAL, :
RADIO & MACHINE WORKERS, AFL-CIO, :

Plaintiff, :

- against - :

STERLING OPTICAL COMPANY, INC., :

Defendant. :

-----X

73 Civil 1444

AFFIDAVIT IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

STATE OF NEW YORK

COUNTY OF NEW YORK

} ss.:

SAMUEL GELB, being duly sworn, deposes and says:

1. I am Executive Director of Sterling Optical Company, Inc. (hereinafter "Sterling"), the defendant herein, with responsibility for matters involving labor relations, training and expansion programs of Sterling's laboratories and optical stores. I have been employed with Sterling for approximately 25 years, initially as an employee and later as an executive, and have personal knowledge of all material facts in this case. I make this affidavit in support of defendant's motion for summary judgment.

2. Sterling is a corporation organized, existing and doing business in the State of New York, with its principal office at 3000 Marcus Avenue, Lake Success, New York. It operates optical stores located in Hempstead, Yonkers, Levittown, Nanuet, Huntington, Bay Shore, Queens, Bronx, Staten Island, Brooklyn and New York City, New York, two stores in New Jersey, and an optical labora-

tory located at 160 Jay Street, Brooklyn, New York.

3. The employees of Sterling, both in its optical stores and laboratory at 160 Jay Street, Brooklyn, New York, are represented in collective bargaining by the United Optical Workers Union, Local 408, affiliated with the International Union of Electrical, Radio & Machine Workers, AFL-CIO (hereinafter "Union"), and have been since about 1953, when the Union was certified by the New York State Labor Relations Board as the sole and exclusive collective bargaining agent of the employees of Sterling.

4. Since the Union was certified in 1953, Sterling and the Union have entered into a series of collective bargaining agreements, the initial agreement being effective April 12, 1954 until April 12, 1955, and the most recent being effective from April 30, 1973 until April 30, 1976.

5. Shortly after the Union was certified, I became Shop Steward for the Union and participated in the negotiations on behalf of the Union which resulted in the initial collective bargaining agreement between Sterling and the Union.

6. Article XXVIII of the current collective bargaining agreement between Sterling and the Union, which permits subcontracting but limits the establishments with whom Sterling may subcontract to those under contract with the Union, first appeared in the initial agreement in 1954 and read as follows:

"ARTICLE XXVIII

It is agreed by and between the parties that whereas the Employer sends out work to be done in different establishments under different managements, therefore, upon signing of this agreement all said work shall be sent to Union establishments."

A copy of this agreement is attached hereto as Exhibit A. ^{50a}

7. Article XXVIII, as it appeared in the initial 1954 agreement, has appeared in each successive agreement between Sterling and the Union without change.

8. On or about September 15, 1973, I notified Sebastian J. Rebaldo, Business Manager of the Union, that the Company had decided to subcontract out the laboratory work then being performed by its employees at Sterling's optical laboratory at 160 Jay Street, Brooklyn, New York, and that Sterling would discontinue its laboratory operation and terminate the employees on or about September 28, 1973.

9. Several days thereafter, on September 19, 1973, I received a telegram from Mr. Rebaldo acknowledging the fact that the Union had been informed of Sterling's decision and requesting a meeting on Wednesday, September 19, 1973, at 7:30 P.M. to discuss Sterling's decision to subcontract the laboratory work then being performed at its optical laboratory in Brooklyn. A copy of this telegram is attached hereto as Exhibit B.

10. On September 21, 1973, I met with Mr. Rebaldo to discuss Sterling's decision to subcontract the work then being performed at its Brooklyn optical laboratory. During this meeting, Business Manager Rebaldo insisted that Sterling's decision to subcontract the work then being performed at its Brooklyn optical laboratory was in violation of Article XXVIII of the current collective bargaining agreement between Sterling and the Union, unless the work was subcontracted to an establishment under contract with the Union.

11. During this meeting, the Union handed me a ^{51a} demand for arbitration, demanding that Sterling arbitrate the issue of whether or not the subcontracting was, among other things, in violation of Article XXVIII of the collective bargaining agreement.

12. Sterling has resisted the Union's efforts to arbitrate the issue of whether or not the subcontracting is in violation of Article XXVIII of the collective bargaining agreement, since Sterling has been informed that Article XXVIII is illegal and void and unenforceable under Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e) insofar as it limits Sterling's right to subcontract to only those establishments under contract with the Union.

13. Despite the fact that Article XXVIII is on its face, void and unenforceable to that extent, the Union nevertheless, continues in its efforts to force Sterling to arbitrate claims arising out of an alleged violation of Article XXVIII.

14. On or about September 21, 1973, and again on or about September 24, 1973, the Union requested arbitration and finally on or about September 28, 1973, Sterling received a notice from the American Arbitration Association stating that the Union had requested arbitration of numerous issues, including inter alia, the following:

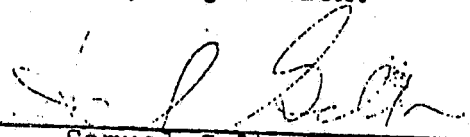
"15. Is the Employer violating Article XXVIII of the parties' contract, by subcontracting out laboratory work performed by bargaining unit employees at the Brooklyn Plant to non-union establishments?"

15. Similarly, on September 25, 1973, the Union initiated the instant proceeding to compel Sterling to

52a

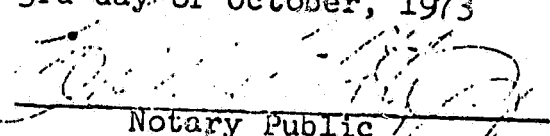
arbitrate the issues set forth in Exhibit B of the complaint, which includes the foregoing issue; for a judgment declaring that Sterling had violated the collective bargaining agreement, despite the fact that the time limit for adjusting the issues had not expired under Article VIII of the agreement; and for an injunction against the subcontracting by Sterling despite the partial illegality of Article XXVIII.

16. A hearing on the Union's request for an injunction against Sterling's subcontracting the laboratory work at its Brooklyn plant is currently scheduled for Tuesday, October 9, 1973, before the Hon. Chief Judge Jacob Mishler in Courtroom 5, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, at 2:00 P.M. For this reason, and since the material facts are basically undisputed and involve the same issues, Sterling's motion for summary judgment is brought on by an Order to Show Cause instead of the customary Notice of Motion with a requested return date of October 9, 1973, the same day as the hearing on plaintiff's request for a preliminary injunction.



Samuel Gelb

Sworn to before me this
3rd day of October, 1973



Notary Public

CHARLES C. HIGH JR.,
Notary Public, State of New York
No. 44-9870353 Qualified in Rockland Co.
Certificate Filed in New York County
Commission Expires March 30, 1974

EXHIBIT A ANNEXED TO AFFIDAVIT OF
SAMUEL GELB
AGREEMENT DATED APRIL 12, 1954

AGREEMENT Made and entered into this 12th day of April, 1954 by and between STERLING OPTICAL COMPANY, INC., located at 138 Fulton Street, New York, New York, hereinafter referred to as the "Employer", and the UNITED OPTICAL WORKERS UNION, LOCAL #408, IUE-CIO, located at 112 East 19 Street, New York, New York, hereinafter referred to as the "Union",

W I T N E S S E T H:

WHEREAS, the parties hereto desire to establish the standards and conditions of labor under which the employees shall work for the Employer during the term of this agreement; and

WHEREAS, it is the intent and purpose of the parties that this agreement shall promote and improve the industrial and economic relations between them, and to set forth herein their agreement covering rates of pay, hours of work and conditions of employment;

NOW THEREFORE, in consideration of the mutual covenants and obligations herein contained, the parties agree as follows:

ARTICLE I

The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all employees, in all Greater New York shops of the Employer, with respects to rates of pay, wages, hours of employment and other conditions of employment, excluding executives and supervisors. The following are the departments: (a) Optometrist; (b) Receptionists, Office Staff and Clerical Personnel; (c) Benes; (d) Quality Control; (e) Surface; (f) RX; (g) Dispensers (Sales and Deliveries); (h) Maintenance; (i) Errand Boys.

ARTICLE II

The Employer agrees that it will not interfere with, restrain or coerce its employees in their right to join or assist the Union; that it will not discriminate in regard to hire or tenure of employment or any terms or condition thereof to discourage membership in the Union; that it will not discharge or otherwise discriminate against an employee because of his union activity providing such activity does not interfere with the proper discharge of his duties as such employee.

a) All new help shall first obtain a work card from the Union before being permitted to work and after obtaining such work card shall then report to the department shop steward who will retain the work card. Such work card shall not be unreasonably withheld by the Union.

ARTICLE III

The Employer agrees that in hiring help, he shall give preference to the Union to furnish such help; however, the Employer reserves the right to hire help from any sources whatsoever. Such employees shall become members of the Union immediately after the termination of the trial period as herein provided and shall remain members of the Union in good standing during the term of this agreement.

a) Upon written notice from the Union, the Employer must discharge any employee not a member in good standing, in the Union. The determination by the Union as to good standing, except as otherwise provided by law, shall be binding upon the Employer.

ARTICLE IV

All employees retained in the employ of the Employer for forty-five (45) consecutive working days (nine

weeks), shall be considered qualified and regular employees; their seniority rights shall be recognized in their respective departments from the first day employed.

a) For the purpose of lay-offs, in the event same shall become necessary, seniority shall be applied by departments. No new employee shall be hired by the Company while any lay-offs are in effect, it being the intention of the parties that the Company shall re-hire all laid-off employees in the inverse order of seniority before any new employees are hired.

It shall be the policy of the Employer to make all promotions from the ranks of the employees, providing they have the ability to perform the work. It is understood that management has the sole right to decide the ability of any employee when making such promotions.

Any employee who is transferred from one department to another, such employee shall still retain his or her seniority from the department from which such employees have been transferred, provided, however, that such transfer or transfers were made for the convenience of management.

ARTICLE V

The Employer agrees that the dues and initiation fees of the members of the Union, according to the schedule which the Union agrees to furnish the Employer, including such fines and assessments which the Union shall levy and give notice thereof, in writing, to the Employer, shall be deducted from the wages of the said members of the Union on the first payroll date of each month. The Employer further agrees to remit such dues, initiation fees, fines and assessments as checked off, to the United Optical Workers Union,

Local #406, IUP-GIO, 112 East 19 Street, New York, New York, within five (5) days thereafter.

ARTICLE VI

The regular working hours for all employees shall be eight (8) hours per day, forty (40) hours per week, Monday through Saturday of each week inclusive, including one day off, except for personnel in the kitchen and porters, whose forty (40) hours shall be spread over Monday through Saturday. The hours of work for maintenance personnel that existed prior to the signing of this agreement, shall remain unchanged for the term of this agreement.

All time worked outside of any eight (8) hour day shall be considered as overtime and shall be paid for at the rate of time and one-half (1½).

Double time shall be paid for work performed on Sundays. Where work is performed on any holiday designated herein as such, time and one half (1½) in addition to payment for such holidays shall be paid. No employee shall be required to work overtime when called upon to do so, if such employee has a reasonable excuse for not working overtime. No employee shall be compelled to work on Sunday or on a designated holiday.

Overtime shall be divided as equally as possible among employees performing similar work, except that the Shop Steward and Committee men shall have preference for overtime work, provided they have the ability to perform such work.

ARTICLE VII

The following shall be holidays, for which every employee shall receive a regular day's pay without perform-

ing any work:

New Year's Day
Washington's Birthday
Memorial Day
Independence Day

Labor Day
Thanksgiving Day
Christmas Day
1st day of Rosh
Hoshona

Rosh Kippur

The following shall be half holidays for which every employee shall receive a half day's pay without performing any work:

Victory Day
Constitution Day

Armistice Day
Lincoln's Birthday

Employees who are full time on a designated half-holiday shall not be paid for the half holiday but shall receive time and one-half for all hours worked. If any of the named holidays fall on an employee's regular scheduled day off such employee shall nevertheless receive pay for the holiday.

ARTICLE VIII

Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an arbitrator to be selected by the New York State Board of Mediation whose decision in the matter shall be final and binding upon both parties to this agreement, even though one of the parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the parties.

ARTICLE IX

The Employer agrees that it will not discharge any employee except for just cause. In the case of drunkenness or theft, discharge may be immediate and without notice.

to the Union. Any employee who is repeatedly late or absent without valid reason and who has been warned concerning such lateness or absence and notice thereof given to the Union, and the employee afforded an opportunity to mend his ways and who fails to discontinue said lateness or absence shall be discharged. This clause shall not be construed as a waiver of the arbitration provisions of this agreement. The Union shall reserve the right to arbitrate any actions taken by the Employer.

ARTICLE X

There shall be no reduction of the individual rates of any employee.

ARTICLE XI

The Employer will furnish all tools necessary or incidental to the work without charge to the employees. No employee shall be charged for any damage to material unless wilfully done.

ARTICLE XII

Wages shall be paid at the end of each week in cash or check. In the event the normal payday falls on a holiday, payment of wages is to be made the following day. All employees who are laid off, quit, or are discharged shall receive all wages and other benefits which they have earned at the time of their layoff, quitting or discharge.

ARTICLE XIII

A representative of the Union shall be permitted to enter the premises of the Employer, at the office of the Employer at any time during working hours, to carry out the terms of this agreement and to ascertain if the terms hereof.

are being complied with.

ARTICLE XIV

The Employer will keep a set of payroll records which will indicate the number of hours worked by each individual employee together with the rates paid to such employees. These records may be examined by the Union through a representative or accountant, or both, during business hours.

ARTICLE XV

During the term of this agreement there shall be no strike, work stoppage, slowdown or lookout.

ARTICLE XVI

A Layoff shall not be effective against employees employed for over three calendar months unless one (1) working day's advance notice thereof is given to the employee or employees affected.

ARTICLE XVII

The Employer shall provide bulletin boards for the exclusive use by the Union, and cause same to be placed on the Employer's premises at places agreed upon by the parties.

ARTICLE XVIII

The Union shall designate a shop steward and committee members, who shall assist the Union in carrying out the intents and purposes of this agreement, providing such activities do not unduly interfere with the proper discharge of his duties as an employee. The Shop Steward shall be entitled to top seniority in the plant.

ARTICLE XIX

The Shop Steward shall have the right to use a telephone for the purpose of communicating with the Union.

ARTICLE XX

The Employer agrees to supply soap and towels for its employees without cost to the employees. The Employer will maintain sanitary conditions throughout the premises.

ARTICLE XXI

The Employer hereby agrees during the term of this contract, to contribute monthly on or before the 5th day of each and every month, commencing with April 1, 1954 to the United Optical Workers Insurance Fund, a sum equal to three and one half percent (3½%) of the previous month's base payroll, to be used by said Insurance Fund for the sole benefit of the employees of the Employer for the purchase of Group Life Insurance, Group Accidental Death and Dismemberment Insurance, Group Accident and Sickness Insurance, Hospitalization Insurance, Group Surgical Insurance, Group Medical Expense Insurance, and Group X-ray and Laboratory Expense Insurance in accordance with the schedule of such respective forms of insurance attached hereto. It is further understood and agreed that the Employer shall be under no obligation to see to the application of monies paid to the Fund pursuant to this paragraph for the purposes and uses above mentioned, but the Fund, nevertheless, agrees to render reports at regular intervals to the Employer respecting application of the monies received and benefits paid.

The Employer agrees to make available to the United Optical Workers Insurance Fund and all records of em-

employees hired, classifications of employees, names, Social Security numbers, and account of wages paid, that the Fund may require in connection with the sound and efficient operation of the Fund, or that may be required by the insurance companies covering the employees, and the agreement contained in this paragraph shall be considered as of the essence of this contract.

ARTICLE VIII

Employees shall be entitled to five (5) working days sick-leave with pay. There shall be no accumulation for any unused sick leave.

Upon the signing of this agreement, new employees hired shall not become eligible for sick-leave until they have been employed for six (6) months. This shall not affect employees who are employed at the time of the signing of the agreement.

Any employee claiming pay for sick-leave shall supply proof of illness, if requested to do so by the Employer.

ARTICLE VIII

a) The minimum wage for Optometrists shall be \$100.00 per week.

The minimum wage for optometrists who have just received their degrees for practice, shall be no less than \$60.00 per week, and said optometrists shall receive an increase of \$5.00 per week at the end of every three month period until they have received not less than the minimum of \$100.00 per week.

b) The minimum wage for Dispensers and Rx, shall be \$40.00 per week.

Apprentice Dispensers, without any experience, who work under permits rather than licenses, shall start at \$40.00 per week and shall receive a \$3.00 per week increase every three months until they have obtained the \$70.00 minimum.

Qualified apprentices (those with licenses and who do not require supervision and have just received their licenses) shall start at \$60.00 per week and shall receive a \$3.00 per week increase every three months until they have obtained the \$70.00 minimum.

d) Receptionists, Office Staff and Clerical employees' minimum wage shall be \$45.00 per week.

For apprentices, the starting rate shall be \$40.00 per week; after six months of employment, they shall receive \$45.00 per week.

e) The minimum wage for Maintenance Employees shall be \$50.00 per week.

f) The minimum wage for Errand Boys shall be \$35.00 per week.

g) The Employer agrees that should any matters arise where there are no rates or minimums established herein, the Union and the Employer shall negotiate for new rates and minimums. Failing to reach an agreement, the matter shall then be referred to arbitration as herein provided.

ARTICLE XXIV

Paid vacations shall be given to employees in accordance with the following schedule and shall be computed as of June 1st in any given year.

6-12 months	1 week
12 months to 5 years	2 weeks
5 years or over	3 weeks

Employees shall take their respective vacations at such time or times as may be fixed by the Employer but not more than one (1) week shall be taken during the summer months.

An employee shall receive an extra day's vacation or shall be paid an extra day's pay for a paid holiday which falls within his vacation period.

ARTICLE XXV

a) This agreement shall constitute the entire agreement between the Employer and the Union and all other agreements made prior to the execution of this agreement whether oral or written are hereby declared null and void.

b) There shall be no discrimination against any employee because of his acting as an officer of the Union, Steward, committeeman.

c) Special employees are not included within the bargaining unit. Special employees are those part-time employees who do not work more than one day per week.

d) Employees who are serving customers at closing time shall continue such service, if so required, for 15 minutes after closing time without additional compensation. If such services are rendered in excess of 15 minutes after closing, the employees are to receive credit for the entire time so spent and shall receive compensatory time off.

e) Employer at its discretion shall determine the time of lunch hours for employees providing same conforms to law.

f) The Employer shall have full and complete right to set up policy for the employees in the unit, to

assign duties, to issue instructions so long as such policies, duties and instructions conform with the laws governing the practice of optometry and optical dispensing.

c) The Union shall in no way interfere with the service relationship of the optometrists and dispensers with the customers of the Employer or with the nature of performance of any service such optometrist or opticians perform for such customers.

d) Supervisory and executive employees may be assigned to duties normally performed by those within the bargaining unit.

ARTICLE XXVI

a) Part-time employees are defined as those not working over the following respective number of hours in any work week;

Optometrists and Dispensers - 32 hours

Chapman - 30 hours

b) Employer has sole discretion in determining number of hours in any work week which a part-time employee shall work not to exceed the number of hours as specified in Paragraph (a) of this Article.

c) Anything to the contrary notwithstanding part-time employees during the months of June to September inclusive in any year, or in the event of emergencies, in any 60 working days may exceed their respective weekly maximum hours, not to exceed the full time weekly hours, without becoming full time employees.

d) Part-time employees as among themselves only shall be entitled to seniority.

e) Employer has discretion in designating full time employees from the ranks of part time employees. The Employer agrees to consider seniority for this purpose.

f) At Employer's discretion part-time employees may be paid up to 25% above the wage scale.

g) All part-time employees shall receive the same benefits embodied in this agreement, in the same manner as full time employees. However, it is agreed that all benefits shall be paid on the basis of their average weekly earnings.

ARTICLE XXVII

No employee shall be transferred from one branch to another without the consent of the employee or employees involved.

a) Should an employee consent to being transferred, he or she shall not lose his or her seniority status or any other benefits, whether in the form of cash or otherwise, from whatever branch such person or persons have been transferred from. Such person shall continue to enjoy all union contract benefits while at whatever branch such persons have been transferred to.

b) The Employer agrees to pay moving and transportation expenses to and from any branch he or she is transferred to, including his or her family, should such persons decide to remain permanently, in accordance with Paragraph c).

c) Any employee who consents to being transferred shall at the end of six-month period decide as to whether or not they wish to remain permanently or return to the branch they were transferred from. Should such persons decide to remain permanently, such persons shall forfeit all rights to return to the branch they were transferred from, except as hereinafter mentioned.

Should such persons decide to return to the branch they were transferred from, they shall return on the basis of Paragraph a), with no loss of seniority status, benefits of any kind, whether in the form of cash or otherwise.

d) In the event the Employer chooses to close a branch in which such persons were transferred to, the Union reserves full and complete right as to what disposition shall be made regarding such transferred personnel, and the Employer agrees to abide by the Union's decision in such cases.

ARTICLE XXVIII

It is agreed by and between the parties that whereas the Employer sends work out to be done in different establishments under different managements, therefore, upon signing of this agreement all said work shall be sent to Union establishments.

ARTICLE XXIX

The Employer agrees, upon the signing of this agreement, to reinstate Martin Rosen, Edward Becker, Herman Schwartz and Harold Marcus to their former positions, without loss of seniority or any other benefits or privileges enjoyed by them prior to their discharge, or any other benefits they would have enjoyed had they not been discharged, whether in the form of wage increases or otherwise, except that the above-mentioned employees shall not make claim for any wages or holiday pay during the period of time from the day they were discharged, to the date of their reinstatement.

ARTICLE XXX

If prior to thirty (30) days before the expiration of this agreement neither of the parties hereto submits new demands in writing or notice of their intention not to renew this agreement, same shall continue in full force and effect for each successive year.

This Agreement shall be in effect as of April 12, 1954 and shall continue in full force and effect until April 12, 1955, and it shall be binding upon the parties hereto, their heirs, successors, executors, administrators and assigns.

a) The Union agrees that it will not assign this Agreement to any other Local Union or any other International Union, during the life of this agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and the year first above written.

UNITED OPTICAL WORKERS UNION
LOCAL #408, IUE-CIO

STERLING OPTICAL COMPANY, INC.

By _____
For the Union

By _____
For the Employer

COMMITTEE:

SCHEDULE OF BENEFITS

GROUP	WEEKLY EARNINGS*	LIFE INSURANCE	ACCIDENTAL DEATH AND DISMEMBERMENT BENEFITS	ACCIDENT & SICKNESS WEEKLY BENEFIT	MAXIMUM SURGICAL PAYMENT	FAMILY HOSPITAL BENEFITS
1	Less than \$24	\$1,250	\$1,250	\$12	\$225	Associated
2	\$24 but less than \$30	\$1,250	\$1,250	\$15	\$225	Hospital
3	\$30 but less than \$36	\$1,250	\$1,250	\$18	\$225	Service
4	\$36 but less than \$42	\$1,250	\$1,250	\$21	\$225	or
5	\$42 but less than \$48	\$1,250	\$1,250	\$24	\$225	New York
6	\$48 but less than \$54	\$1,250	\$1,250	\$28	\$225	
7	\$54 and over	\$1,250	\$1,250	\$35	\$225	

MEDICAL EXPENSE BENEFITS

\$5 for home or hospital visit

\$3 for office visit

\$150 maximum per disability

X-RAY AND LABORATORY BENEFITS

For diagnostic purpose, in an equal amount to the fee actually charged for such examination, but not in excess of the maximum of \$25.00 will be paid within a period of six consecutive months.

*An employee's earnings shall be his base pay on a 40-hour week.

EXHIBIT B ANNEXED TO AFFIDAVIT
OF SAMUEL GELB
TELEGRAM



Telegram

GRA056(1238)(1-023511A261)PD 09/18/73 1237

212-577-4061

ICS IPMDCND NYK

04049 FR DC NEWYORK NY 85 09-18 1155A EDT

489-7902

PMS SAMUEL GELB, EXEC VP RPT DLY (DLR)

STERLING OPTICAL CO

3000 MARCUS AVE

LAKESUCCESS NY

WE'VE BEEN ADVISED OF YOUR DECISION TO CLOSE DOWN YOUR LABORATORY
AT 160 JAY ST BROOKLYN NY AND SUB-CONTRACT OUT BARGAINING
UNIT WORK. THIS IS A CLEAR VIOLATION OF OUR EXISTING
COLLECTIVE BARGAINING AGREEMENT.

WE WISH TO MEET WITH YOU WEDNESDAY SEPT 19 730 PM

WITH REGARDS TO YOUR UNILATERAL DECISION TO SUB-CONTRACT OUT
SAID WORK. SUGGEST WE MEET AT

THE GRAMERCY PARK HOTEL. PLEASE REPLY PROMPTLY

SEBASTIAN J REALDO BUSINESS MGR

*Received
9/19/73 PM
1:30*

1201 (R5-66)



Telegram

UNITED OPTICAL WORKERS UNION LOCAL 408
IUE AFL CIO 200 PARK AVE SO NY NY

*Michael S.R.
9/21/73
Arto 3:30 PM*

REPLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the INTER-
NATIONAL UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS, AFL-CIO,

73 Civ. 1444

Plaintiff,

REPLY

--against--

STERLING OPTICAL COMPANY, INC.,

Defendant.
-----X

Plaintiff, by Sipser, Weinstock, Harper & Dorn
its attorneys, for its reply to defendant's counterclaim:

1. Denies each and every allegation contained in paragraph "7" of the counterclaim.
2. Denies paragraph "8" of the counterclaim except admits that plaintiff has demanded arbitration concerning certain actions of the defendant which allegedly violated various provisions of the parties' collective bargaining agreement, including Article XXVIII.

As an affirmative defense, alleges:

That the Court is without jurisdiction to consider the merits of disputes subject to arbitration, that being the exclusive province of the arbitrator pursuant to the provisions of the parties' collective bargaining agreement.

WHEREFORE, plaintiff respectfully prays for judgment
as follows:

contract between the plaintiff and the defendant.

72a

2. Directing and compelling the defendant to arbitrate the issues which have arisen between the parties as set forth in the plaintiff's demand for arbitration, in accordance with the contract provisions.

3. Restraining and enjoining the defendant from subcontracting out laboratory work performed by bargaining unit employees at its Brooklyn plant, closing down the laboratory operations at the Brooklyn plant, or any portion thereof, laying off and/or terminating laboratory employees at its Brooklyn plant, or discontinuing its normal business operations thereat prior to the completion of the arbitration proceeding and the rendering of the arbitrator's award determining the issues.

4. Dismissing defendant's counterclaim in its entirety.

5. Granting to the plaintiff such other and further relief as may be just and proper in the premises, together with the costs and disbursements of this action.

Dated: New York, N. Y.

October 17, 1973

SIPSER, WEINSTOCK, HARPER & DORN

By: Bell & Harper

380 Madison Avenue
New York, New York 10017
212-867-2100

STIPULATION OF FACTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED OPTICAL WORKERS UNION, :
LOCAL 408, affiliated with the :
INTERNATIONAL UNION OF ELECTRICAL :
RADIO & MACHINE WORKERS, AFL-CIO, :
Plaintiff, :
-against- :
STERLING OPTICAL COMPANY, INC., :
Defendant. :

73 Civ. 1444(J.M.)
STIPULATION OF FACTS

-----X

Plaintiff, by its attorneys, Sipser, Weinstock, Harper & Dorn, and defendant, by its attorneys, Parker, Chapin and Flattau, hereby enter into the following stipulation of facts solely for the purposes of the determination of the applications heretofore made and returnable before the Honorable Chief Judge Jacob Mishler:

1. Plaintiff is a labor organization and is the certified collective bargaining representative for employees employed by defendant.
2. Defendant operates numerous optical shops in the New York City area and maintains a warehouse and laboratory located at 160 Jay Street, Brooklyn, New York, and is engaged in interstate commerce.
3. Plaintiff and defendant are parties to a collective bargaining agreement currently in effect and due to expire on April 30, 1976.

4. The collective bargaining agreement provides,^{74a}
in Article XXVIII, as follows:

"It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon the signing of this Agreement all said work shall be sent to Union Establishments."

5. The arbitration provision of the collective bargaining agreement provides in Article VIII as follows:

"Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both Parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Cost of arbitration shall be born equally by the Parties.

"(a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided.

6. On or about September 17, 1973, defendant advised plaintiff that effective September 28, 1973, defendant would subcontract out certain laboratory work then being performed by defendant's employees at its Brooklyn laboratory located at 160 Jay Street, Brooklyn, New York, discontinue the laboratory operation and terminate the employees then performing such work.

7. Thereafter, on September 19, 1973, Sebastian J. Rebaldo, Business Manager of plaintiff, telegraphed defendant that its decision to subcontract out laboratory work was in violation of the Agreement between plaintiff and defendant and requested a meeting.

8. On September 21, 1973, plaintiff and defendant met and discussed the defendant's decision to subcontract out certain work then being performed by defendant's employees at 160 Jay Street, Brooklyn, New York, its decision to discontinue the laboratory operation, and its decision to terminate the employees then performing said work, but were unable to resolve the disputes.

9. During the meeting of September 21, 1973, plaintiff requested arbitration and on September 24, 1973, plaintiff served its request for arbitration upon defendant by registered mail. In said request for arbitration, plaintiff contended that the defendant's unilateral decision to subcontract out work described in paragraph 6 violates the following provisions of the parties' collective bargaining agreement, to wit: Articles I, II, VII, IX, XVI, XXI, XXII, XXIII, XXIV, XXVII, XXVIII, XXIX, and XXX.

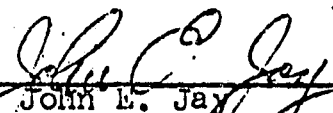
10. On September 28, 1973, defendant received a notice from the American Arbitration Association that plaintiff had requested arbitration of whether or not defendant's subcontracting violated numerous provisions of the collective bargaining agreement, as set forth in paragraph 9 above.

11. Defendant has resisted arbitration of any issue based on or arising out of Article XXVIII, contending that said Article is void and unenforceable under Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e), insofar as it restricts defendant's right to subcontract to only those establishments under contract with plaintiff.

Dated: New York, New York
November 5, 1973.

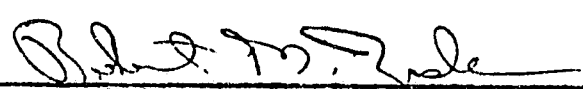
PARKER, CHAPIN AND FLATTAU

By


John E. Jay
A Member of the Firm
530 Fifth Avenue
New York, New York 10036
(212) 986-7200

SIPSER, WEINSTOCK, HARPER & DORN

By


Robert M. Ziskin
380 Madison Avenue
New York, New York 10017
(212) 867-2100

ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
:
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the : 73 Civ. 1444 (J.M.)
INTERNATIONAL UNION OF ELECTRICAL, :
RADIO & MACHINE WORKERS, AFL-CIO, :
Plaintiff, : ORDER TO SHOW CAUSE
-against- :
STERLING OPTICAL COMPANY, INC., :
Defendant. :
-----X

Upon the summons and complaint herein, the answer and counterclaim, the annexed affidavit of Sebastian J. Rebaldo, sworn to the 25th day of October, 1973, it is

ORDERED that the defendant STERLING OPTICAL COMPANY, INC., show cause at a hearing before the Honorable Jacob Mishler, to be held in Courtroom 5, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on November 16, 1973, at 11:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made herein granting summary judgment in the plaintiff's favor dismissing defendant's counterclaim which seeks judgment:

1. Dismissing the complaint insofar as it seeks to compel arbitration of any issue or claim arising out of an alleged violation of Article XXVIII of the collective bargaining agreement.

2. Dismissing the complaint insofar as it seeks judgment that defendant has violated the collective bargaining agreement between the plaintiff and the defendant.

3. Declaring that Article XXVIII of the collective bargaining agreement between defendant and plaintiff is unenforceable and void insofar as it limits defendant's rights to subcontract only to those establishments under contract with plaintiff; that the claim of plaintiff based on the alleged violation by defendant of the obligations purported to be imposed by said Article XXVIII presents no issue properly arbitrable under the terms of the collective bargaining agreement; and to the extent lawful, Article XXVIII recognized defendant's right to subcontract work covered by the collective bargaining agreement.

4. Restraining plaintiff from giving effect to said Article XXVIII and staying all arbitration proceedings to the extent they present claims of the plaintiff based on or arising out of any alleged violation by defendant of said Article XXVIII.

5. That defendant have costs of this action and such other, further and different relief as to the Court shall seem just and proper;

on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

IT IS FURTHER ORDERED, that service of a copy of this order and of the papers upon which the same is granted, on Parker, Chapin & Flattau, attorneys for defendant, be made on or before November 14, 1973, at 4:00 P.M. in any manner provided by the Federal Rules of Civil Procedure and that proof of such service be filed herein.

Dated: November 14, 1973
Brooklyn, New York

121 JACOB MISHLER
U. S. D. J.

STATEMENT UNDER RULE 9 (g)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
:
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the : 73 Civ. 1444 (J.M.)
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO, :
Plaintiff, : STATEMENT UNDER
-against- : RULE 9(g)
STERLING OPTICAL COMPANY, INC., :
Defendant. :
-----x

STATEMENT OF THE MATERIAL FACTS
AS TO WHICH PLAINTIFF CONTENDS
THERE IS NO GENUINE ISSUE TO BE
TRIED

The following material facts are undisputed:

1. This is an action under Title 29, United States Code, Section 185 to compel defendant to proceed to arbitration in accordance with Article VIII of the collective bargaining agreement between the parties.

2. Defendant is a corporation, organized and existing and doing business in the State of New York. Defendant operates optical shops located in Hempstead, Levittown, Huntington, Bay Shore, Jamaica, Staten Island, Brooklyn and New York City, New York and an optical laboratory at 160 Jay Street, Brooklyn, New York, and is engaged in an industry affecting interstate commerce within the meaning of Section 2(6) and 2(7) of the National Labor Relations Act, as amended ("Act"), 29 U.S.C. §152(6) and 152(7).

3. Plaintiff is a labor organization representing employees for collective bargaining purposes in an industry

effecting interstate commerce within the meaning of §2(5) of the Act. 81a

4. Jurisdiction is conferred on this Court by Title 29, United States Code, Section 185.

5. The Union was certified by the New York State Labor Relations Board, in or about 1953, as the sole and exclusive collective bargaining agent of the employees of the Employer. It has since then represented and continues to represent said employees.

6. The Employer and the Union, have since the aforesaid certification entered into a series of collective bargaining agreements, the most recent of which was entered into on April 30, 1973, and continues in effect until April 30, 1976.

7. The collective bargaining agreement between the parties, in Article VIII, provides for a grievance procedure and for arbitration of differences which the parties are unable to resolve. That Article in relevant part provides as follows:

"Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.

"(a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided."

8. On or about September 17, 1973, the Employer without prior notice to or consultation with the Union, advised that it had determined to subcontract out laboratory work, which work has at all times material herein been performed by bargaining unit employees employed at 100 Jay Street, Brooklyn, New York, and that the Employer would on or about September 28, 1973 discontinue the laboratory operations of its Brooklyn plant and terminate the employment of its 36 bargaining unit laboratory employees.

9. The said action of the Employer was in violation of numerous provisions of the collective bargaining agreement between the parties, including, among others, Articles I, II, IV, VII, IX, XVI, XXI, XXII, XXIII, XXIV, XXVII, XXIII, XXIX, and XXX.

10. The Union met with the Employer in an effort to resolve their differences, but were unable to adjust such differences.

11. Accordingly, and on or about September 21, and 24, 1973, the Union served the Employer with a demand to arbitrate the items of difference between the parties. (A copy of the aforesaid Demands is annexed to the Complaint as "Exhibit B").

12. All of the issues and disputes set forth in the plaintiff's previously described request for arbitration fall within the broad scope of the arbitration clause set forth above.

13. The Employer has refused the demand of the plaintiff for arbitration.

14. The refusal of the defendant to arbitrate

is in violation of the collective bargaining agreement.

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Dated: New York, New York

October 25th, 1973

SIPSER, WEINSTOCK, HARPER & DORN

By:

Robert M. Zuckerman

380 Madison Avenue
New York, New York 10017
212-867-2100

**AFFIDAVIT OF SEBASTIAN J. REBALDO IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with the
INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO,

73 Civil 1444

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.

-----x

AFFIDAVIT IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SEBASTIAN J. REBALDO, being duly sworn, deposes and
says:

1. I am and have been the Business Manager of
plaintiff, UNITED OPTICAL WORKERS UNION, LOCAL 408, affiliated
with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE
WORKERS, AFL-CIO (hereinafter the "Plaintiff") for approximately
forty years and have personal knowledge of all material facts
in this case. I make this affidavit in support of Plaintiff's
motion for summary judgment to dismiss the defendant's counter-
claim.

2. STERLING OPTICAL COMPANY, INC. (hereinafter
the "Defendant") is a corporation, organized and existing and
doing business in the State of New York. Defendant operates
optical shops located in Hempstead, Levittown, Huntington,
Bay Shore, Jamaica, Staten Island, Brooklyn and New York City,
New York and an optical laboratory at 160 Jay Street, Brooklyn,
New York, and is engaged in an industry affecting interstate
commerce within the meaning of Section 2(6) and 2(7) of the

85a

National Labor Relations Act, as amended ("Act"), 29 U.S.C. §152(6) and 152(7).

3. Plaintiff is a labor organization representing employees for collective bargaining purposes in an industry affecting interstate commerce within the meaning of §2(5) of the Act.

4. Plaintiff was certified by the New York State Labor Relations Board, in or about 1953, as the sole and exclusive collective bargaining agent of the employees of the Defendant. It has since then represented and continues to represent said employees.

5. The Defendant and the Plaintiff, have since the aforesaid certification entered into a series of collective bargaining agreements, the most recent of which was entered into on April 30, 1973, and continues in effect until April 30, 1976.

6. The collective bargaining agreement between the parties, in Article VIII, provides for a grievance procedure and for arbitration of differences which the parties are unable to resolve. That Article in relevant part provides as follows:

"Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.

"(a) Any grievances or disputes arising under the Contract which are not resolved

within ten (10) days from the date either 86a
Party is informed by registered mail, shall
be submitted immediately to Arbitration by
the requesting Party as hereinabove provided."

7. On or about September 17, 1973, the Defendant without prior notice to or consultation with the Plaintiff, advised that it had determined to subcontract out laboratory work, which work has at all times material herein been performed by bargaining unit employees employed at 160 Jay Street, Brooklyn, New York, and that Defendant would on or about September 28, 1973 discontinue the laboratory operations of its Brooklyn plant and terminate the employment of its 36 bargaining unit laboratory employees.

8. The said action of the Defendant was in violation of numerous provisions of the collective bargaining agreement between the parties, including, among others, Articles I, II, IV, VII, IX, XVI, XXI, XXII, XXIII, XXIV, XXVII, XXIII, XXIX, and XXX.

9. On September 21, 1973, I met with Samuel Gelb, Executive Director of the Defendant in an effort to resolve our differences, but were unable to adjust such differences.

10. Accordingly, and on or about September 21, and 24, 1973, Plaintiff served Defendant with a demand to arbitrate the items of difference between the parties. (A copy of the aforesaid Demands is annexed to the Complaint as "Exhibit B").

11. All of the issues and disputes set forth in the Plaintiff's previously described request for arbitration fall within the broad scope of the arbitration clause set forth above.

12. Defendant has refused the demand of the plaintiff

for arbitration.

13. The refusal of the defendant to arbitrate is a violation of the collective bargaining agreement.

14. Since the material facts are basically undisputed and involve the same issues, Plaintiff's motion for summary judgment is brought on by an Order to Show Cause instead of by Notice of Motion.

Sebastian J. Rebato

Sworn to before me this

12th day of October, 1973

Bertha Starr Guscott

BERTHA STARR GUSCOTT
Notary Public, State of New York
No. 31-1607400
Qualified in New York County
Term Expires March 30, 1975

FINAL JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED OPTICAL WORKERS UNION,
LOCAL 408, affiliated with
the INTERNATIONAL UNION OF
ELECTRICAL, RADIO & MACHINE
WORKERS, AFL-CIO,

73 C 1444

FINAL JUDGMENT

Plaintiff,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant.

The parties having stipulated to all the material facts in lieu of a trial on the merits and the court having made its decision in a memorandum of decision dated December 6, 1973,

NOW THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that paragraph XXVIII is violative of Section 8(e) of the National Labor Relations Act as amended (29 U.S.C. § 158(e)) and is null and void and of no effect and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff and defendant shall submit to arbitration, the grievances and disputes set forth in exhibit B of the complaint in accord-

ance with article VIII of the labor agreement entered into
between the parties and dated April 30, 1973.

Dated: Brooklyn, New York
December 6, 1973



U. S. D. J.

MEMORANDUM OF DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED OPTICAL WORKERS' UNION,
LOCAL 408, affiliated with
the INTERNATIONAL UNION OF
ELECTRICAL, RADIO & MACHINE
WORKERS, AFL-CIO,

73 C 1444

Plaintiff,

-against-

Memorandum of Decision

STERLING OPTICAL COMPANY, INC.,

Defendant.

December 6, 1973

United Optical Workers Union, Local 408 (Union), whose members engage in highly skilled laboratory work, alleges that Sterling Optical Company, Inc. (Sterling), the employer of members of the Union, subcontracted out its laboratory work on or about September 17, 1973, without prior notice to, or consultation with the Union. The complaint states that Sterling terminated the employment of thirty-six employees. The Union claims that Sterling, in refusing to arbitrate the dispute, violated the agreement between the

parties dated April 30, 1973, specifically Article VIII.^{/1}

The complaint prays for judgment: 1) directing arbitration; and 2) enjoining the subcontracting out of laboratory work previously performed by its thirty-six bargaining unit laboratory employees.^{/2}

Sterling's answer alleges that the subcontracting clause in the agreement, contained in Article XXVIII,^{/3}

^{/1}Article VIII provides:

"Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.

(a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided."

^{/2}Jurisdiction is based on Section 301(a) of the National Labor Relations Act (29 U.S.C. § 185(a)), which gives the United States District Courts jurisdiction over "Suits for violation of contracts between an employer and a labor organization"

^{/3}Article XXVIII provides as follows:

"It is agreed by and between the Parties that where- as the Employer send work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments."

is illegal in that it limits the employer's right to subcontract to establishments having agreements with labor unions, in violation of Section 301 of the National Labor Relations Act.¹⁴ The answer contains a counterclaim which seeks declaratory judgment, declaring Article XXVIII of the agreement void and interpreting the clause as authorizing subcontracting without limitation.

¹⁴ 29 U.S.C. § 158(e).

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception." Id.

The Union moved (on notice) for a temporary restraining order and preliminary injunction. The court denied the Union's application for a temporary restraining order and scheduled an evidentiary hearing on the motion for a preliminary injunction. The parties stipulated the material facts (stipulation of facts appended to this memorandum), and both parties moved for summary judgment.

POWER OF THE COURT

Arbitration is the preferred method of resolving labor disputes. Contract law and national policy^{/5} leave a well defined though small area of jurisdiction to the court in the instance where the parties have agreed to arbitrate their labor disputes. That area includes a determination of whether the agreement provides for arbitration of the dispute. In interpreting the clause this court notes that doubt should be resolved in favor of arbitration of the dispute.

/5

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960).

United Steelworkers of America v. Warrior & Gulf Nav. Co.,
363 U.S. at 582-83, 80 S.Ct. at 1353.¹⁶

Whether an issue is arbitrable is to be determined by the court in the absence of an express, or at least clear, intention that the issue be decided by the arbitration.

Drake Bakeries, Inc. v. Local 50, American Bakery Workers,
370 U.S. 254, 82 S.Ct. 1346 (1962); Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 557, (2d Cir. 1965); Torrington Co. v. Metal Products Workers Union, Local 1645, 347 F.2d 93, 96 (2d Cir. 1965). The court here finds that the issue of whether Article XXVIII of the agreement contravenes Section 8(e) of the Act is not arbitrable. Todd Shipyards Corporation v. Industrial Union of Marine & Ship Workers, 232 F.Supp, 589 (E.D.N.Y. 1964), aff'd. 344 F.2d 107 (2d Cir. 1965). The court finds the agreement, to the extent that it permits subcontracting to "union establishments", to be unenforceable and void. Section 8(e) of the Act. (29 U.S.C. § 158(e)); Bakery Wagon Drivers & Salesmen, Local Union No. 484 v. National Labor Relations Board, 321 F.2d 353, 367 (D.C.

¹⁶In Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 251-253, 90 S.Ct. 1583, 1592-1594 (1970), the court briefly recites the history and purpose for both encouraging settlement of labor disputes through arbitration and limiting the court's participation to directing the parties to arbitrate all arbitrable disputes.

Cir. 1963). Sterling argues that only the limitation in clause XXVIII should be excised. Implicit in this argument is the interpretation that it has the unlimited right to subcontract work previously performed by laboratory employees. The further implication is that it is free of any obligation imposed under Section 8(a) 5 of the Act. (29 U.S.C. § 158 (a)(5)).¹⁷ The court rejects the argument. Whether Sterling has performed its statutory obligation and the consequences of any failure to do so are matters for the arbitrator. National Labor Relations Board v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961); Hawaii Meat Co. v. National Labor Relations Board, 321 F.2d 397 (9 Cir. 1963).

¹⁷ 29 U.S.C. § 158(a)(5) provides:

"(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

29 U.S.C. § 159(a) states in part: "[the] [r]epresentatives . . . shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment"

The parties having stipulated to the relevant facts and indeed having established that the facts set forth in the stipulation are all the relevant facts in lieu of a trial on the merits, the various motions for partial summary judgment (and by plaintiff for a preliminary injunction) are mooted. The court denies an injunction in this case for the reason that plaintiff has an adequate remedy through the arbitration procedure.

A final judgment has this day been entered decreeing Article XXVIII null and void and directing arbitration on all the matters set forth in exhibit B of the complaint.



U. S. D. J.

NOTICE OF APPEAL

Defendant.

NOTICE OF APPEAL

B.v

Office & P.O. Address
530 Fifth Avenue
New York, New York
10036
Tel. (212) 986-7200

ORDER STAYING JUDGMENT
PENDING APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X

UNITED OPTICAL WORKERS UNION, :
LOCAL 408, affiliated with the :
INTERNATIONAL UNION OF ELECTRICAL, :
RADIO & MACHINE WORKERS, AFL-CIO, :

Plaintiff, :

-against-

STERLING OPTICAL COMPANY, INC., :

Defendant. :

73 Civ. 1444
(J.M.)

ORDER STAYING JUDGMENT
PENDING APPEAL

- - - - -X

This cause came on to be further heard on motion of defendant pursuant to Rule 62 of the Federal Rules of Civil Procedure staying the effect of, and any proceedings to enforce, the judgment heretofore entered on December 10, 1973, pending appeal by the defendant to the Court of Appeals for the Second Circuit, and it appearing to the Court that said defendant may be subjected to irreparable injury if said judgment, insofar as it compels arbitration, should be enforced pending said appeal,

gm

the Arbitration Proceeding

IT IS ORDERED that ~~said judgment~~ be and is hereby stayed pending said appeal, without bond, upon the condition that said defendant diligently prosecutes said appeal, subject to review by the Court, on January 18, 1974, at 11:30 A.M., in Courtroom 5, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, upon application of plaintiff, alleging that defendant has failed diligently to prosecute said appeal.

Dated: Brooklyn, New York
January 11, 1974

James Mueller
U.S.D.J.

*filed
Jan 11 '74*

Two (2)
Service of ~~three (3)~~ copies of the within
is hereby admitted

this *8* day of *March, 1974*
SIPSER, WEINSTOCK, HARPER & DORN
380 MADISON AVENUE
NEW YORK, N.Y. 10017
Attorney(s) for *Appellee*